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1944-1945

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

A YEAR AGO we were reading in the *Journal* the interesting program which Pat Eager had arranged and many of us were looking forward to the meeting in September. Until recently at least the hope still remained that some turn of the wheel would make possible this year's meeting and a renewal of the relationships which always prove to be of inestimable value. To that end a program was formulated and was to have been submitted at this time. Upon it are the names of men whose messages would have been inspiring.

It is with genuine regret that the announcement is made that we are not to enjoy the privilege of foregathering as had been planned and that another year must pass before we meet again. There appears to be no chance that the ODT restrictions will be relaxed or that the transportation requirements of the armed forces will be diminished before 1946. Since the hotel is entitled to a definite commitment, the reservation has been released, and without even convening, we stand adjourned. The sound of the final gavel always brings a feeling of sadness and this one *in absentia* is no exception. May the fortunes of war permit the holding of the regular meeting next year and arrangements for it are being made. In the meantime, the members of the Executive Committee and officers will continue to do everything they can to maintain the activities and to promote the high standing of the Association; but do not let this assurance affect your own efforts. Your counsel, advice, assistance and enthusiasm never were more necessary than they are in a year when we cannot get together to talk things over.

It is heartening to know that the difficulty of even finding time for their regular work did not prevent the members of the committees from responding admirably to the demands made upon them. The committee reports, of which some are reproduced in the July *Journal,* reflect the zealous efforts which the organization inspires and constitute a real contribution to certain phases of insurance law. The Association is indebted to those who thus have maintained and advanced its prestige, and to those who, by graciously accepting places on the program, have given further assurance of their loyalty.

Every now and then a son or other relative is assigned to the Lincoln Army Air Field. Seeing them is a pleasure and I hope that none will fail to let me know that he is here. He might even enjoy a chair at the family fireside. This is an invitation.

F. B. BAYLOR,
President.

Lincoln, Nebraska.

Insurance Counsel Journal

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INSURANCE COUNSEL

GEORGE W. YANCEY, *Editor and Manager*
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The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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VOL. XII JULY, 1945 No. 3

NEW MEMBERS

Since publication of the roster of members in the April 1945, issue of *Insurance Counsel Journal,* the following have been elected to membership:

BAILEY, JOSEPH L.—Albuquerque, N. Mex.
Bailey & Rogers
208-216 Sunshine Building

COCHRAN, A. D.—Okmulgee, Okla.
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Hengst & Trantham
16 East Broad Street

MOORE, ALVIN O.—Chattanooga 2, Tenn.
Williams, Frierson, Reynolds & Moore
707 Chattanooga Bank Building

MOORE, GEORGE J.—Malone, N. Y.
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100 Milk Street

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16 East Broad Street

WILLIAMS, R. W., JR.—Baton Rouge 6, La.
Bagwell & Williams
Louisiana National Bank Building

Report Of The Aviation Insurance Law Committee

YOUR committee has, due to war travel conditions, been unable to hold meetings. The members of the committee, however, have been in touch with each other by correspondence and are endeavoring to arrange a round table meeting. Our plans are sufficiently developed at this time to assure a successful program if it can be held. If it cannot be held, we expect to produce, in lieu thereof, papers worthy of publication in the *Journal.*

We have arranged, tentatively, for the following papers:

1. "Liberalization of Accident and Life Coverages of Aviation Risks by Judicial Decisions and Policy Revisions," by E. J. McAlleney, Attorney, and R. T. Sexton, Assistant Secretary, Connecticut General Life Insurance Company, 55 Elm Street, Hartford, Connecticut;

2. "Pending Federal and State Legislative Proposals and their Effects upon Aviation Insurance if Enacted," author yet to be determined; and

3. "The Trial of Aviation Accident Cases," by Forrest A. Betts, Title Insurance Bldg., Los Angeles, Calif.

Your committee has not had brought to its attention since the last meeting of the Association judicial decisions warranting particular comment in this report. There is, however, pending in Congress a measure which, if enacted, will have far reaching effects upon common carriers by air, upon private plane owners, upon aviation insurance carriers, and upon the general public. We refer to the bill known as HR 532, 79th Congress, the so-called O'Hara Bill. It is not the purpose of your committee in this report to enter into a discussion of the pros and cons of this measure.

Suffice it to say it would provide, among other things, for a rebuttable presumption of liability on the part of common carriers by air for death or bodily injury to passengers being carried for hire. Concomitantly, it limits the maximum recovery in death cases to $10,000 and in bodily injury cases to the actual damages, but not to exceed $50,000. It is the theory of this measure that it will supplant, in aviation accident cases, existing state decisions and statutes as to rules governing liability and on amounts

of recovery in such cases. The important questions inherent in this measure will command the interest and attention of insurance law practitioners.

Sixteen states and the District of Columbia have statutory recovery limits in death cases. Apparently these statutes would be left in effect by the O'Hara bill and would cover unlawful death cases, except those arising out of aviation accidents. One of the important questions immediately suggested by this circumstance is as to the constitutionality of such an enactment by Congress, were it to legislate in this field.

From what has been said above, it may be inferred that this bill will probably be discussed in one of the papers above mentioned.

Your committee extends a hearty invitation to the membership of the Association at large to attend the contemplated round table meeting when, as, and if held.

Respectfully submitted,

STANLEY C. MORRIS, *Chairman*
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Ex-Officio: FORREST A. BETTS
W. PERCY MCDONALD

Report Of Committee On Casualty Insurance

THREE topics were selected for study and report by the committee. The subjects have been chosen with a view to meeting some of the current problems facing casualty insurance lawyers. One of the subjects, i.e., "Interesting Recent Cases Involving Questions of Coverage Under Ordinary Policy Forms," is a continuation of a study made by last year's committee. It was the feeling of the members of the committee that a continuation of this study, reviewing the cases of the past year with some additional cases, would be helpful. The committee was divided into sub-committees as follows:

Sub-Committee: E. C. Woodard, Chairman, L. J. Locke, Frank Cobourn, P. L. Thornbury; *Topic*: "Interesting Recent Cases Involving Questions of Coverage Under Ordinary Policy Forms."

Sub-Committee: Joseph A. Spray, Chairman, Wilbur C. Schwartz, James D. Conway, Leslie P. Beard; *Topic*: "Present-Day Tendencies Toward Excessive Verdicts."

Sub-Committee: Forrest S. Smith, Chairman, Milton A. Albert, Elias Field, Todd Daniel; *Topic*: "The Question of Whether the Government Has a Claim for Damages or Loss of Services and Expenses on Account of Injuries to Members of the Armed Forces."

I

INTERESTING RECENT CASES INVOLVING QUESTIONS OF COVERAGE UNDER ORDINARY POLICY FORMS

AUTOMOBILE POLICY CASES

RECENT DECISIONS INVOLVING THE WAR EMERGENCY, PRICE CONTROL AND RATIONING AS RESPECTS DAMAGES UNDER FIRE, THEFT AND COLLISION COVERAGES.

Weems vs. Service Fire Insurance Company, 20 Automobile Cases 61. Tenn. 178 S.W. (2d) 377. Decided March 4, 1944.

"INSURER'S LIABILITY — ACTUAL CASH VALUE *v.* COST OF REPLACING PARTS. Plaintiff brought this action to recover under a policy for damages arising out of the theft of his automobile. The vehicle was stolen and stripped of all wheels, tires, tools, and other parts, and left damaged along the roadside. By the terms of the policy the amount of the coverage was the actual cash value of the car or the cost of replacement. The insured contended that he was entitled to the actual cash value of the car, since neither he nor the insurance company could get a priority for the purchase of tires and tubes and the car was useless without them. The insurer insisted upon settling by paying plaintiff cash for the estimated cost of repairs and the government ceiling prices on tires, tubes and wheels,

instead of replacing them. The trial court rendered judgment for plaintiff for the cost of repairs and the ceiling price on the other articles. On appeal to the Court of Appeals, that court modified the judgment by allowing plaintiff the actual cash value of the automobile less the value of the automobile after the theft, declaring that when the lost property was not replaceable the insurance company should be required to pay the actual cash value and be deprived of the option, impossible of performance, of replacing the property lost with other of like kind or quality. On certiorari to this court (Supreme Court) an examination of the record convinced the court that the Court of Appeals had reached the proper conclusion and the modified judgment for the insured was affirmed."

* * *

Motors Insurance Corporation vs. Dooms, 22 Automobile Cases 335, 154 Pac. (2d) 955. Decided January 9, 1945.

"THEFT OF AUTOMOBILE—INSURER'S TENDER OF AMOUNT SUFFICIENT TO REPAIR—GOVERNMENTAL REGULATIONS PREVENTING PURCHASE OF NEW TIRES—DEPRECIATION IN MARKET VALUE OF CAR RECOVERED BY INSURED. Plaintiff's automobile was stolen and a few days later was found with its five tires and wheels missing. Plaintiff instituted this suit against defendant insurance company seeking to recover an amount representing depreciation in the market and usable value of the car. To the petition the insurance company filed its answer wherein it tendered to plaintiff the sum of $187.64, the alleged cost of repair and governmental ceiling replacement price of those portions of the car which were missing when the car was found. The parties stipulated as to the facts. Under the stipulation, if the court held for plaintiff the amount of his recovery was to be in the sum of $500; if defendant prevailed, the amount was to be $187.64. The policy upon which the suit was brought contained a theft provision and further provided that: 'The Company's liability for loss shall not exceed the actual cash value of the insured property at the time of loss nor what it would then cost to repair or replace either the insured property or any part thereof with other of like kind and quality, with proper deduction for depreciation from any cause except when occurring after theft and prior to recovery thereof, and shall in no event exceed the limits of liability stated in the Declarations. * * * The Company shall have the right to return any stolen property, with compensation for resultant damage thereto, at any time before the loss is paid.' The insurer relied upon the 'doctrine of commercial frustration' in support of its contention and asserted that the limit of its liability under the policy was the amount tendered and it was immaterial that the insured, because of governmental regulations was 'unable to purchase new tires and tubes with the insurance money.' The court upheld the trial court's judgment enforcing the insurer's obligation to pay the insured for the damage to his automobile regardless of the war or governmental regulations connected therewith and ordering payment in the sum of $500, which represented the depreciation in market value of the automobile. Judgment was affirmed."

* * *

Hendershot vs. Ferkel and Motorists Mutual, 21 Automobile Cases 312, 56 N.E. (2d) 205. Decided August 9, 1944.

"SERVICE OF PROCESS—NON-RESIDENT MOTORIST'S LAW—ACTUAL NOTICE. Plaintiff brought this action to recover for personal injuries sustained through defendant's negligent operation of an automobile. At the time of the accident, defendant was a resident of the State of Ohio, but prior to the filing of the present action, defendant moved to the State of California. Pursuant to the provisions of the non-resident motorist's law, service of process was made on the Secretary of State, who forwarded a copy by registered mail to defendant in California. The envelope containing the copy was returned by the postal department with the notation 'Unknown at address' and the sheriff's return was so made. Judgment was rendered against defendant, and a supplemental petition was filed making the automobile insurer a party defendant. The court found the service of process valid as against the motorist and rendered judgment over against the insurer. The Ohio Court of Appeals reversed the judgment of the trial court and rendered judgment for the insurer. However, on appeal this court in construing the applicable statu-

tory provisions declared that actual notice to the defendant was not required, since provision for mailing copy of summons 'to the last known address' in itself evidenced a legislative intent to provide for cases in which notice was not actually delivered to the defendant, and that the statute extended the right of service of process to those who subsequently became non-residents. Therefore, the judgment in favor of the insurer was reversed and the cause remanded."

But it is interesting to note the neat dodge to which the Supreme Court resorted on the contention of the insurance company that if the defendant had been legally served with summons, he violated the policy provisions in failing to forward the summons to the insurance company as required by the policy:

"The defendant finally contends that Clarence Ferkel violated the provisions of the contract of insurance in failing to give it notice of this suit, although at the same time contending that he had no notice of the suit to forward to it, in compliance with the terms of the policy. This question is not before the court. It was submitted to the trial court, and it found adversely to the defendant. The Court of Appeals considered no issue except that of service."

* * *

Scott Fullmer vs. Farm Bureau Mutual (Pa.), 21 Automobile Cases 537, 39 A (2d) 623. Decided October 31, 1944.

Under Public Service Commission Endorsement, where the vehicle was not specifically covered and was not being used under the policyholder's permit at the time of the accident, there is no liability on the insurance carrier as the accident is not covered by the policy.

"INSURER'S LIABILITY—COVERAGE OF POLICY. Two minors were injured when a school bus in which they were riding was struck by a truck owned by one Tipton. Actions were brought against Tipton which resulted in judgments being obtained against him. The present actions were brought against Tipton's insurer to obtain satisfaction of the judgments. The policy provided that coverage was extended to injuries resulting from the negligent operation of motor vehicles under certificate of public convenience or permit issued to the insured by the Pennsylvania Public Utility Commission or otherwise under the Public Utility Law regardless of whether such vehicles were specifically described in the policy or not. It was admitted that the vehicle involved in the collision was not specifically described in the policy, but plaintiffs contended that it was included under the policy by reason of the above endorsement. Plaintiffs' counsel admitted during the trial that the truck was not being operated at the time of the accident under a permit issued by the Commission. Therefore, plaintiffs failed to show that the vehicle involved in the accident was covered by the policy, and the non-suits entered by order of the trial court were affirmed on appeal."

* * *

Howe, Appellant, vs. The Crumley, Jones & Crumley Company Appellant, Ohio Farmers Indemnity Company Appellee. Ohio Court of Appeals, First Appellate District. 21 Automobile Cases 226. 57 N.E. (2d) 415. Decided March 10, 1944.

AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES CLAUSE. Each vehicle covered by the insured's policy was specifically designated therein and, in addition, there was a clause providing automatic insurance for newly acquired automobiles. A 1930 White truck, owned at the time the policy was acquired, was not one of those specifically designated in the contract. One of the enumerated vehicles was damaged in a collision, and the insured replaced it with the 1930 White truck. This truck was involved in a collision and the insurance company contended that the truck was not covered by the policy because there was no agreement to insure against liability for its use. The insured contended that the "Automatic Insurance for Newly Acquired Automobiles" clause brought the vehicle within the coverage of the policy. The court held the language of the clause plain and unambiguous, and that it did not provide coverage for a vehicle which had been in the possession of the insured for some time before the policy was issued. If the insured had wished to include it, he would have specifically enumerated it in the policy.

* * *

Gibbs vs. Employers Mutual Liability Insurance Company of Wisconsin. N. C. Supreme Court, 21 Automobile Cases 347, 31 S.E. (2d) 377. Decided September 1, 1944.

WHEN USE OF CAR NOT COMMERCIAL. The business or occupation of insured is that of paper manufacturer. Driver of the truck is made an additional insured under the policy (for liability arising when the truck is used commercially and principally in the business occupation of the insured). The driver was hauling Irish potatoes as a project of his own. This was held no part of the business of paper manufacture, and the court held that there was no coverage under the policy. Russ, the driver, at the time of the accident was using and driving the truck to haul for pay the potatoes of his neighbors.

• • •

Workman et al D.B.A. Workman & Sayles, Appellant vs. The Republic Mutual Insurance Company, Appellee, Kidwell, Appellant. Ohio Supreme Court. 21 Automobile Cases 192. 56 N.E. (2d) 190. Decided August 2, 1944.

"GARAGE LIABILITY ENDORSEMENT—SELLING CAR IN POOR MECHANICAL CONDITION. Workman & Sayles, dealers in automobiles and operators of a repair garage, sold an automobile to Rhodes. Rhodes while driving was involved in a collision and injured Kidwell who sued Rhodes and Workman & Sayles and recovered a judgment against all defendants. The basis of the judgment against Workman & Sayles was that they had sold to Rhodes an automobile known to them to be in poor mechanical condition and dangerous to the lives and property of others in the lawful use of the highways over which it might be driven. The Republic Mutual Insurance Company, the insurer of Workman & Sayles, defended under a reservation of rights, and after judgment was rendered against Workman & Sayles, withdrew from the case on the ground that the accident in question was not covered by the policy. Workman & Sayles filed the present action seeking a declaratory judgment requiring the defendant insurer to continue (on appeal) the defense of the injury suit. Coverage was claimed by Workman & Sayles under the "Premises Liability" clause, which applied to "injuries sustained by any person or persons (not employed by the insured) on or about the premises described." The court held there was no language in the insurance contract which could be construed to insure against liability for injuries resulting from defective parts or inefficient workmanship and that, furthermore, the clause covers any automobile *owned by or in charge* of the named insured for purposes necessary to the conduct of the named insured's business.

• • •

Rodenkirk, for use of Deitenbach vs. State Farm Mutual Automobile Insurance Company. 60 N.E. (2d) 269. Decided March 21, 1945.

OTHER AUTOMOBILES CLAUSE OF LIABILITY POLICY. "Other automobiles" clause of liability policy excluding liability if insured was driving automobile furnished for his "regular use" covered liability in case of occasional driving of automobiles other than insured's, but not in case of automobiles under his control that he could use at will and might use often. The case turns on a question of fact as to whether the automobile which Rodenkirk was operating at the time of the accident was hired by him as a part of his frequent use of hired automobiles or was furnished to him for his regular use or for the regular use of a member of his household. It was found that the automobile which he was operating had been furnished for his regular use and for the regular use of his daughter, who was a member of his household. The evidence is set out at length in the decision and cannot be summarized here, but the court makes the following interesting observation concerning the "other automobiles" clause of the policy:

> "The exclusion from coverage of other cars owned by the insured as well as cars owned by the members of his household, and the exclusion of cars furnished for regular use to the insured or a member of his household would seem to indicate the intention of the company to protect itself from a situation where an insured could pay for one policy and be covered by the insurance in driving any car that he decided to use whether owned by him or members of his family, or cars that had been furnished for his regular use; in other words, cars under his control that he could use at will and might use often. Without some such exclusion it is obvious that the company might lose premiums and also, that the hazard under the insurance would be increased. It is evident that the purpose on the part of the company in extending

the driver's regular insurance without the payment of any additional premiums would apply to the occasional driving of cars other than his own, but would be inapplicable to an automobile furnished to the insured for his regular use."

* * *

PUBLIC LIABILITY POLICY CASES

Berger Bros. Electric Motors Inc., vs. New Amsterdam Casualty Company. 5 Fire and Casualty Cases 375. 58 N.E. (2d) 717.

WHETHER ALLEGED ACCIDENT OCCURRED DURING PROGRESS OF WORK OR AFTER COMPLETION OF OPERATIONS. This case was discussed in last year's report and at that time the Appellate Division of the New York Supreme Court had held that there was coverage under the policy. The Court of Appeals reversed the Appellate Division and held that the work had been completed and that there was no coverage. Briefly, the facts of the case are as follows: The plaintiff's employees did an improper job of hooking up the motors to the incubator fans on Chillson's farm. As a result, turkey eggs in the incubator were damaged and could not be hatched out. The policy insuring Berger Bros. excluded liability for any accident "resulting from defective workmanship after the assured's work is completed." The Trial Court (Supreme Court) held that the loss was not a result of an accident and, inferentially, that the accident did not occur during the progress of operations. The Appellate Division reversed the lower court and held against the defendant on both issues, namely, that the loss or damage was the result of an accident, and that the work had not been completed. (See July 1944 *Insurance Counsel Journal.)* The Court of Appeals reversed the Appellate Division and held that the work had been completed, but did not decide whether the loss was the result of an accident, stating that conceding the mishap to the turkey eggs was an accident, they were constrained to conclude that it did not occur before the work had been completed.

* * *

Smith vs. U. S. Fidelity and Guaranty Company (Neb.). 4 Fire and Casualty Cases 441. 6 N.W. (2d) 81. Decided October 30, 1942.

DEFENSE OF SUIT BY INSURER—COVERAGE OF POLICY—WHETHER ACCIDENT OCCURRED AFTER COMPLETION OF OPERATIONS—WAIVER AND ESTOPPEL. "Under a contractors' public liability policy, the insurer agreed to defend actions brought against named contractors for injuries or death sustained 'during the progress of work.' The policy excluded liability for accidents occurring after the final completion of the work performed by the contractors at the place of occurrence of such accidents. The contractors, in connection with a public road project, installed culverts and, after the job was completed, they moved all of their equipment from the location, the work was approved and accepted by the state, and final payment was made. Thereafter, an automobile occupant was injured by reason of the dangerous condition thereof and, in this action, the contractors sought to recover the expense incurred in defending the damage suit brought against them and which the insurer refused to defend. No recovery was allowed. An insurer is under no obligation to defend a case against the insured when it would not be liable under its contract for any recovery had therein. The policy contained no ambiguity, uncertainty, nor inconsistency and, since the injuries sustained did not occur 'during the progress of work' the claim was not within the coverage of the policy."

* * *

Duval vs. Aetna Casualty & Surety Company (Mich.) 4 Fire and Casualty Cases 613. 8 N.W. (2d) 112. Decided February 23, 1943.

"DUTY TO DEFEND EXCEPTED CLAIM AGAINST INSURED. A contractor's liability insurer refused to defend an action brought against him to recover damages resulting from a fire which broke out on premises where he had installed and repaired some heating equipment. The contractor successfully defended the action and brought suit against the insurer to recover the expense thereof. The court rules that the insurer was not required to defend the contractor against claims expressly excluded from coverage in the policy. The exception was a part of the contract. The duty of the insurer to defend was not independent of the duty to pay damages, if any. The two provisions were not separable." The provision of the policy construed was as follows:

"Exceptions to Agreement—The company shall not be liable for or on account of any claim * * * or by accident occurring after the final completion of the operations of the assured at the place of occurrence of such accident."

* * *

Ashland Window and Housecleaning Company vs. Metropolitan Casualty, 5 Fire and Casualty Cases 503. 53 N.Y.S. (2d) 677. Decided March 9, 1945.

DELAY IN DENYING LIABILITY AS CONSTITUTING WAIVER AND ESTOPPEL. An insured under a public liability policy brought this action against the insurance company to recover the amount of a judgment recovered against the insured and to recover expenses incurred in defending the suit. The insurance company denied liability on the ground of non-coverage. The insured maintained that the insurer's conduct in assuming and controlling the defense of the cross-claim against the insured and then abandoning it on the eve of trial irrevocably prejudiced the insured's position and estopped the insurance company from asserting that there was no coverage for the claim under the policy. An employee of the insured window washing company was injured while engaged in his employment when a rope split which supported one side of the scaffold on which he was working. The public liability policy in question expressly excluded coverage for injuries sustained by employees. The injured employee brought an action against the American Chicle Company to recover for the injuries which occurred on their premises. The Chicle Company joined plaintiff insured as a third party defendant, and it was this cross-claim that defendant insurer undertook to defend. The trial court directed a judgment for the insurance company on the ground that there was no evidence to justify any finding that there was any injury by delay in returning the papers. This court on appeal was convinced that this finding was erroneous and that the question of whether or not the insurance company's conduct was so prejudicial to plaintiff as to estop the insurer from asserting non-coverage should have been submitted to the jury as a question of fact. Therefore, the judgment for the insurer was reversed and the causes remanded for a new trial.

Cohen vs. Keystone Mutual Casualty Company (Pa.) 4 Fire and Casualty Cases 582, 30 Atl. (2d) 203. Decided January 28, 1943.

Policy exclusion of damage to property in care or custody of assured under contractor's coverage.

"CONTRACTOR'S PUBLIC LIABILITY INSURANCE—CARE AND CUSTODY OF PROPERTY. Plaintiffs were hired by a general contractor to demolish the five upper stories of the front part of an eight story building. In moving debris across the roof of the one-story section in the rear of the building, the roof collapsed and damaged the ceiling, walls, plumbing, wiring, and other parts of the first story. Plaintiffs brought suit against their public liability insurer for the amount which they were obliged to assume for the damage. The insurer denied liability on the ground that the damaged property was in the custody and care of plaintiffs when the accident occurred and was thus expressly excluded from the coverage of the insurance. There was, however, ample evidence to support a finding that plaintiffs did not have the care and custody of the damaged property and the judgment entered in their favor was upheld. By their contract, they were required to carry on their work so as not to interfere with works on the first floor. As to the first story section of the building, the court believed that plaintiffs were in no different position than if it were a separate building under different ownership."

* * *

Trinity Universal Insurance Company vs. General Accident (Ohio) 3 Fire and Casualty Cases 432. 35 N.E. (2d) 836. Decided July 23, 1941.

General and specific coverage – Public liability and automobile policies.

"TWO POLICIES COVERING LOSS—OTHER INSURANCE CLAUSES. Defendant insurer issued a policy protecting a dairy company against liability for accident occurring on its premises. The policy provided that if other insurance covered an accident on the premises which occurred from the operation of a motor vehicle, then defendant's liability would be in excess of such insurance. Plaintiff insurer issued a policy protecting the dairy company against liability arising from the operation of a delivery truck and provided, in case of other insur-

ance, for pro rata liability. A dispute arose when a customer of the insured was fatally injured when struck by the delivery truck. It was held herein that plaintiff insurer was primarily liable under its policy. The coverage provided by the policy of the defendant was general while that named in the policy issued by the plaintiff was specific. Under the general rule, the specific insurer is primarily liable. Also, defendant's policy was the only one mentioning excess insurance."

Apart from the provision as to excess coverage in the case of accident by automobile where the automobile was specifically insured, as was provided in the General Accident policy, the court referred to the application of the principle:

"GENERAL-SPECIFIC COVERAGE". "First, it must be observed that the coverage provided by the policy of the defendant company is general while that named in the policy issued by the plaintiff is specific. The latter is limited strictly to liability for bodily injury or death accidentally arising from operation of the truck. The former covers liability for any accidental bodily injury, including death, occurring anywhere on the premises of the insured. Hence, under the general rule, the specific insurer is primarily liable."

* * *

II

PRESENT-DAY TENDENCIES TOWARD EXCESSIVE VERDICTS

A very able analysis of this subject was submitted by Mr. Joseph A. Spray, chairman of the sub-committee. Mr. Wilbur C. Schwartz, one of the members of the subcommittee, has also submitted an analysis approaching the question from a somewhat different viewpoint and it is felt desirable that both discussions be included in the general committee report. Both reports, therefore, are presented, Mr. Spray's being given first, followed by that of Mr. Schwartz.

* * *

In order that a discussion of the subject of excessive verdicts could be made upon a practical basis, it was decided to make a survey of actual verdicts rendered, to see what light they might cast upon the subject. For this purpose all of the jury verdicts made in actions involving personal injuries in the Courts of the Superior Court of the State of California, in and for the County of Los Angeles, were examined from the period comencing January 1, 1940, to June 7, 1945, excluding therefrom the year 1942. The records for the year 1942 are not included because they were not available, but we have no reason to believe that they would indicate any different trend for that year than the years that are herein included. This survey, therefore, covered two pre-war years, two war years, and the current year up to the date of the preparation of this article.

The records of the Los Angeles Superior Court were reviewed because it was felt that they presented a sufficient volume of negligence action verdicts from which definite trends could be observed and legitimate conclusions reached. Furthermore, the conditions existing in Los Angeles county throughout this period have been somewhat normal and typical of other large metropolitan areas throughout the country. We were fortunate in having the records of Pat Taylor Jury Service of Los Angeles for use in obtaining information for this paper, which records were accurate and extremely helpful.

The Superior Court of Los Angeles County during the period covered was a court of original jurisdiction in all cases wherein the prayer was $2,000 or more. Cases involving less than $2,000 are tried in the Municipal Court of the City of Los Angeles. The verdict, however, in the Superior Court trial can be any amount from nothing up to the amount prayed for. The jury consists of twelve persons, both men and women being eligible. They are selected by a Jury Commissioner from the Voters' Register, and serve for a limited period of time only. Either party to the action is entitled to a jury trial upon demand and payment of $24 per day jury fees and the mileage of the jurors. As a result, in normal times at least, the jurors as selected constitute a general cross section of society, and the jury panels are devoid of professional jurors. The actions are tried before any one of the Superior Court judges assigned to civil jury departments, of which there are usually approximately ten such departments.

With this short introduction of the background of the jury system in Los Angeles County, we will proceed to the presenta-

tion of the results of our study, which to us, at least, proved very interesting. From January 1, 1940, through June 7, 1945, excluding the entire year 1942, 1129 cases involving personal injuries arising from alleged negligence, were submitted to the juries of the Los Angeles Superior Courts for determination. This does not include the cases which resulted in non-suits or directed verdicts, or the cases which were settled during the course of the trial. Each of these cases was one in which the question of liability and damages, or either of said issues, was in conflict. Of the 1129 verdicts reached, 560 verdicts were in favor of the plaintiffs, and 569 resulted in defendants' verdicts. The plaintiffs' verdicts in the 560 cases in which they were successful, totaled a grand sum of $3,754,856.00. Apportioning this amount equally among the 560 successful plaintiffs, gave each of them an average verdict of $6,705.00.

The foregoing figures being cumulative cannot give a picture of any trend that might be existent in the recent years' personal injury verdicts. To obtain such a picture, we have segregated the verdicts and classified them separately under the years 1940, 1941, 1943, 1944, and 1945 to June 7th. The breakdown of the totals into those particular years is disclosed by the following table:

	Year 1940	Year 1941	Year 1943	Year 1944	Year 1945 to June 7
Number of Cases	294	308	220	205	102
Plaintiff Verdicts	150	140	101	117	52
Defendant Verdicts	144	168	119	88	50
Percentage Plaintiff Verdicts	51%	45%	46%	57%	51%
Highest Single Verdict	$33,000	$37,851	$77,600	$66,500	$74,320
Total of all Plaintiff Verdicts	$702,851	$691,367	$729,783	$1,022,077	$608,778
Average Plaintiff Verdict	$4,686	$4,938	$7,226	$8,736	$11,707

The most obvious conclusion reached from a study of these figures is the trend of the average plaintiff's verdict to increase year by year. Starting with the year 1940, when the average plaintiff's verdict was $4,686, every subsequent year has seen this amount increase to where the period of 1945 covered by this report shows an average plaintiff's verdict of $11,707, or an increase of almost two and one-half times in less than five years. It is significant to observe that throughout the entire period covered, the success of plaintiffs as against defendants remained approximately the same, and this figure is very close to fifty per cent. There has been no significant change in this regard in recent years. For the total period covered in Los Angeles County, the defense lawyers won only four-tenths of one per cent more cases than did the plaintiffs' lawyers, or a grand total of exactly nine cases.

It is felt that the trend indicated by these figures is comparatively accurate due to the large number of cases considered, and the fact that no single year was thrown out of balance by any unusual circumstance or exceptionally large verdict. In other words, the factors from which the survey was made presented as ideal a situation as statistics based on human equations will lend themselves to.

From the studies made by your committee, and in particular, analyzing the foregoing facts, we are of the definite opinion that there has been a marked trend toward an increase in the amount of jury verdicts during the last several years. It would further appear that this increase has outdistanced proportionately the increase in cost of living, or, to put it conversely, the decrease in the value of the dollar.

The causes of the trend toward larger verdicts seem to be primarily two-fold, one an economic reason, and the other a sociological one. First, it is common knowledge throughout the country, and in particular, with the men and women who constitute the panels from which jurors are selected, that the dollar is not worth what it used to be. They know what the dollar can buy now compared with its purchasing power prior to the war, and all of them have seen the price of commodities, real estate, wages, and everything else that a dollar is used for, rise year by year. As a jury they are called upon to fix a value upon an injury to a fellow man, or loss of life, in terms of dollars and cents. Here, like in every other field, the value of the dollar from its pres-

ent-day ability to purchase, is taken into consideration in fixing the amount of the verdict. And this fact is often favorably brought to the juror's attention in the argument made by plaintiff's counsel.

Sociologically, the conditions brought about by the war have resulted indirectly in a tendency to increase the amounts of plaintiffs' awards. Prior to the war, and here we are speaking particularly of the situation as it exists in Los Angeles, but is true in many other areas, the jurors were selected from all walks of life by means of the Voters' Register. However, since the war, though the means of selection remains the same, there has been a great increase of persons disqualifying themselves from jury service because of occupational reasons. Many of the industries essential to the war effort have been foreclosed entirely as a source of jury material. In Los Angeles County this has resulted in a present-day composition of the average panel as follows: 85 per cent housewives; 10 per cent retired men; 5 per cent with occupations. With the great majority of the jury panel being wholly inexperienced in business, the general ability of the jury to reach a sound and reasonable verdict has greatly decreased. The result has been a considerable increase in the amount of the verdict for injuries warranting lesser amounts.

It is our opinion that the question of insurance, or a belief in the juror's mind that the defendant is insured, has had no material effect on the size of the verdicts. This situation has remained relatively the same throughout the last several years. Most jurors assume that there is insurance, whether it is brought out in the courts of trial or not, and base their deliberations and verdict accordingly.

As we have limited ourselves to a discussion of the factors affecting an increase in verdicts, we are disregarding many important elements which often affect verdicts in other ways, such as the effect of newspaper publicity, tendency of jurors to disregard instructions of the Court, confusion of jurors of legalistic phraseology on the part of attorneys and the Court, and the general tendency of jurors to shift the burden to the defendant. We do not feel that any one or all of these factors have materially contributed to the trend of larger verdicts.

The Courts have often been presented the question as to a particular verdict being excessive under all of the circumstances. As years have gone by, what was formerly a standard or yard stick to measure the value of any specific injury, has fallen by the wayside and been replaced by later cases of larger amounts. Upon occasion, specific judgments have been appealed from and the excessiveness of the verdict was presented to the Appellate Court for determination. It has been the uniform practice of the Courts to hold a verdict as excessive only when it appears so as a matter of law, as being unsupported by the evidence, or when it is such as to suggest at first blush, passion, prejudice or corruption on the part of the jury. Courts have generally recognized the fact that changes take place in social conditions and cause the cost of living to rise, making verdicts which in past years would be held excessive, now being sustained as reasonable.

This exact issue was presented in the action of *O'Meara vs. Haiden,* 204 Cal. 354, where an appeal was taken from a verdict of $10,250 awarded to a father for the death of his seven year old son. This case was decided in 1928, and eleven years previously the California Supreme Court had reversed a verdict for the same amount for the death of a six and one-half year old son as being excessive. In upholding the later award as not being excessive the Court in its opinion states in part as follows:

> "Were we to follow that case (the case of eleven years previous) we would be compelled to grant a reversal of the judgment herein. That case was decided in October, 1917, almost eleven years ago. Since the decision thereof, r a d i c a l changes have taken place in social conditions, and particularly in conditions affecting the cost of living. Courts have recognized this fact in passing upon the size of verdicts, and have almost invariably made allowances therefor. In view of the changing conditions that now prevail from those existing some ten years ago, we do not feel that we would be justified in following at this time the views expressed by this Court in that case regarding the subject of excessive verdicts. Under the present conditions that case cannot be accepted as a final authority in determining whether the verdict in the present action is excessive or not. On the other hand, the present verdict must

be considered under the conditions prevailing at the present time, or at least at the time it was rendered in January, 1925. We must, as courts in other jurisdictions have done in passing upon similar questions as that involved herein, take judicial notice of the fact that the value of the dollar has materially changed from what it was some 10 to 15 years ago. Whether it is "cut in half" as intimated by the excerpt from one of the above-mentioned authorities, or not, it is universally admitted that it has materially decreased in value from what it was a few years ago. There has been a corresponding increase in wages and salaries as well as in the cost of living in all walks of life. The sum of $10,000 when measured by its present purchasing power is far less than what it formerly was. A verdict, therefore, in this amount for personal injuries may well be sustained by the courts of today, when formerly it would have been their duty to set it aside as excessive."

In *Quinn v. Chicago, M. & St. P. Ry. Co.*, 162 Minn. 87, the Supreme Court of Minnesota said:

"In recent years there has been a noticeable increase in the size of the verdicts in personal injury cases. The Courts approve of verdicts today which would have been unhestitatingly set aside as excessive ten or fifteen years ago. Measured in money, the earning capacity of most men has increased; measured by its purchasing power, the value of a dollar has decreased. No immediate change in the situation is in sight. It is only right that these well known facts should be taken into consideration."

Similarly the Supreme Court of New Jersey expressed itself in the case of *Bowes v. Public Service Ry. Co.*:

"At a period when the purchasing power of the dollar has in the language of the day been "cut in half", the value of the sum awarded her is not to be estimated in the numerical quantum of recompense, but in its comparative ability to furnish the necessities of life."

The three foregoing cases are not late cases, but are cited to indicate what has always been the Court's attitude toward money judgments for personal injuries. Throughout the years the change in conditions, the increase of earning power, and the decrease of purchasing power of the dollar has been held to warrant an ever-increasing amount in verdicts. Recent cases substantiate the same principle. In the action of *Hunton v. California-Portland Co.*, 64 Cal. (2d) 876, the father sought to recover for the death of his 17-year-old son. The verdict was $40,000, which the trial court was called to pass upon on a motion for new trial. In determining the pecuniary loss, the trial court stated that: "Assuming those conditions went on" his minority would have continued for four years at $1,200 a year, or $4,800. The court then said: "With gold now at $35 an ounce, in place of $17.50 or $18, money is worth half of what it was when most of these cases were decided." He then reduced the verdict to $18,000. The Appellate Court in its decision stated that the change in the value of money hardly warranted a jump from $4,800 to $18,000, and ordered the judgment reduced to $10,000. This particular action exemplifies the present judicial opinion toward monetary judgments, and shows the judicial mind of 1944 valuing the war dollar at 50 per cent. In doing so, the Court is keeping in line with the average jury verdict of 1944 compared with 1940.

The views of Mr. Schwartz are as follows:

Is it actually a fact that, all things considered, there is at the present time a strong tendency toward excessive verdicts? The answer is materially controlled by the perspective. Some counsel for defendants feel that any verdict larger than their idea of settlement value is excessive. This may be accounted for because it is based upon the facts as reflected by their judgment rather than the evidence most favorable to the plaintiff, which is accepted by the Appellate Court as being true in reviewing the assessment of damages. Today, as in the past, in small communities where the plaintiff is usually known to the jury and some members are informed, off the record, as to the extent of plaintiff's injuries and disability, they are prone to base the verdict upon this personal knowledge rather than the evidence formally presented in court. As a matter of fact, grossly excessive verdicts usually occur only in the metropolitan areas and the fundamental cause may be attributed chiefly to the difference in economic conditions. Contributing factors

are that the juries are composed of men who are receiving higher wages and are also aware that the purchasing power of a dollar has been lessened. The cases are well tried by experienced plaintiffs' counsel and the injuries and medical phase of the cases thoroughly developed by expert testimony. Frankly, we doubt that there is at present more of a tendency toward excessive verdicts than in the past.

Obviously, the question of whether or not a verdict is excessive is qualitative rather than quantitative. The number of dollars awarded by a jury means nothing without a full consideration of the injuries and damages suffered by the plaintiff, and it has been our experience in Missouri that there have been remittiturs in judgments exceeding $10,000 in far greater proportions than in judgments for less than that amount. This may be accounted for because the courts have more leeway. Our Appellate Courts, particularly the Supreme Court, have enunciated certain rules by which they purport to consider the questions of the excessiveness of a verdict and the necessity and amount of a remittitur. A major consideration to which the Court pays service in taking into account the amount of an award is the necessity of reasonable uniformity as to the amounts of verdicts, maintaining that what has been held fair and reasonable in one case shall be used as a yardstick to judge what is fair and reasonable in another. This is evidenced by one of the leading cases, *O'Brien v. Rindskopf,* 334 Mo. 1233, 70 S.W. (2d) 1085, which has been cited on numerous occasions by our Supreme Court to the effect that when the facts as to the injuries inflicted and losses sustained are similar, there should be a reasonable uniformity as to the amount of the verdict. Some other recent cases following the O'Brien case are *Murphy v. Fred Wolferman, Inc.,* 148 S.W. (2d) 481, *Kelley v. Illinois Central Railroad Company,* 177, S.W. (2d) 435, and *Philibert v. Benjamin Ansehl Company,* 119 S.W. (2d) 797.

Another factor which the Court considers is the economic condition prevailing at the time of the verdict. This was one of the bases for refusing to interfere with the amount of the verdict in the very recent case of *Mooney v. Terminal Railroad Ass'n,* 186 S.W. (2d) 450, a death case under the Federal Employers Liability Act decided March 5, 1945, in which the judgment was $35,000, the largest amount theretofore affirmed in Missouri in such a case.

The Supreme Court of Missouri has apparently set a top limit of $50,000 as compensation for personal injuries. However, the Court was very careful to say recently that it was not bound by such amount in any particular case. This was said in the case of *Jones v. Pennsylvania Railroad Co.,* 182 S.W. (2d) 157, in which the trial court had awarded a new trial after a judgment under the Federal Employers Liability Act in the amount of $203,000. After first stating that this Court is not aware of any case in which an amount in excess of $50,000 has ben approved in Missouri, the case of *Span v. Jackson, Walker Coal & Mining Co.* (1928), 322 Mo. 158, 16 S.W. (2d) 190, in which a verdict of $50,000 was held to be proper, was cited. In the Span case, which is a much-cited authority, the plaintiff sustained such serious injuries as to be a complete physical wreck and a horrible example of how badly one may be injured and live. The Court then stated: "We do not cite the case as determining the minimum or maximum of the measure of compensation in the case at bar, and desire that this court be of untrammeled and just decision in determining that which constitutes a reasonable award according to the particular facts of a cause as viewed in relation to economic conditions and with a regard to a reasonable uniformity." The Court in the Jones case indicated that an award greater than that in the Span case would be approved, but stated that the amount of the verdict therein must be viewed as excessive to the extent of many thousands of dollars. Many authorities of other states are collected, none of which involved awards in excess of $100,000. The trial court had set aside the verdict upon the ground that it was so grossly excessive as to indicate that it was the result of passion and prejudice. From this order plaintiff appealed. The Appellatae Court held that the trial court could properly infer bias and prejudice from the size of the verdict alone, and that in so inferring and ruling the trial court did not act arbitrarily.

The Jones case, by the way, has had a rather stormy career. At the first trial there was a verdict of $175,000, in which the Court ordered a remittitur of $50,000 and, upon plaintiff's refusal to comply with the

order, the verdict was set aside and a new trial granted. From this there was no appeal taken and the case was retried with the result just above stated. Thereafter, plaintiff brought a new suit in the Federal Court which was tried last week, resulting in a verdict in his favor in the sum of $150,000. This we believe to be the largest verdict ever returned by any jury in the Federal Court of Missouri. The plaintiff was an 18-year-old brakeman at the time of his injury on March 16, 1942, in Indiana when he was thrown from the brake platform of a train operated by the defendant and the cars rolled over him, also dragging him several hundred feet. His right leg was amputated near the hip by the wheels passing over it. His body was crushed and his left side paralyzed. It was plaintiff's contention that he would be required to spend large sums annually throughout his life for surgery, hospitalization, drugs and attendants. It was conceded that his injuries totally disabled him from the performance of any physical tasks. (On June 5th, the defendant paid the $150,000 into the registry of the Court.)

Another recent case involving a large verdict is *Morris v. E. I. DuPont de Nemours & Co.*, 139 S.W. (2d) 984, in which the jury awarded $100,000 for injuries consisting of the loss of sight of both eyes, a ruptured eardrum, and other painful injuries to plaintiff's head, chest, and arms. The Court, after giving consideration to the amount which in other cases had been held to be fair and reasonable compensation for injuries, ruled that this verdict was excessive by many thousands of dollars. It was further pointed out that in no other case had they permitted a verdict to stand for more than one-half of the amount awarded in the Morris case. However, a remittitur was not ordered for the reason that other errors were committed which the Court held affected not only the amount of the verdict but also the question of liability.

In the case of *Aly v. Terminal Railroad Ass'n of St. Louis*, 119 S.W. (2d) 363, a judgment of $85,000 was reduced to $40,000 by the Appellate Court. In that case a 42-year-old switchman, in good health before the injury and earning a substantial wage, was caused to lose both legs above the knees and was required to have an attendant or submit to an operation which might or might not enable him to wear artificial limbs, in addition to suffering great pain, both physically and mentally, and extreme nervousness. The Court examined other cases and held that on the basis of such cases, as well as those from other states, the verdict was excessive to the indicated amount.

Another factor which the Court considers in passing upon the question of excessiveness is whether or not the trial court has directly passed upon that question by substantially reducing the amount of the award. Where the trial court has ordered a substantial remittitur, the Supreme Court is usually reluctant to require a further remittitur. To this effect is the recent case of *Schaefer v. Transamerican Freight Lines*, 173 S.W. (2d) 20, in which the verdict was for $15,000 for injuries to the plaintiff's spinal cord and back and nervous system, but which had been reduced by the trial court to $11,500. To the same effect is *Gieseking v. Litchfield & Madison Railway Co.*, 127 S.W. (2d) 700. On some occasions our Supreme Court has stated that the ultimate test whether or not a verdict is excessive is what will fairly and reasonably compensate the plaintiff for the injury sustained. To such effect is *Summa v. Morgan Real Estate Co.*, 165 S.W. (2d) 390. This so-called test, however, is rather meaningless, because it really amounts to a statement that the test is what the Supreme Court judges think is fair and reasonable compensation and amounts to a substitution of their judgment upon a consideration of the record for that of the jury, which has the benefit of personal observation of the plaintiff and the witnesses. So far as the Court is concerned in determining whether or not the award is excessive, greater consideration is given to precedent than to the independent judgment of the Court based on the facts of the particular case unencumbered by what another court has held. The mere fact that a verdict is less than $10,000 does not mean that it may not be proportionately as excessive as a judgment for $100,000, and about the only relief to be had from an unreasonable verdict of this type is through the trial judge.

III

THE QUESTION OF WHETHER THE GOVERNMENT HAS A CLAIM FOR DAMAGES OR LOSS OF SERVICES AND EXPENSES ON ACCOUNT OF INJURIES TO MEMBERS OF THE ARMED FORCES

The scope of the problem, as will be seen from a reading of it, is confined to cases involving personal injuries and is not concerned with any contractual or other rights.

It is recommended that anyone having a problem of this nature carefully read the articles by Captain Robert B. Harbison and Colonel Ralph G. Boyd, presented to the American Bar Association at its annual meeting in September, 1944, and found in the report of proceedings of the Section of Insurance Law at pages 44 and 53; and the decision of United States District Court for the Southern District of California in the case of USA vs. Standard Oil Company of California et al, decided May 18, 1945.

It will be noted, as stated in the Standard Oil decision, that there are no precedents for the case involving a tortious injury to a member of the Armed Forces.

Initially, it will be advisable to consider certain fundamental aspects in the type of problem covered by this sub-committee report. When a person enters the Armed Forces of the United States, a relationship arises between him and the Government. This relationship is not necessarily based upon contract nor is it one of employer and employee. The attributes of this relationship exist as long as he is a member of the Armed Forces and he cannot terminate it. The relationship continues when he undertakes to perform services for a private employer while on furlough.

During the existence of the relationship, the Army is under an obligation to pay his wages and to furnish him hospitalization and medical attention. See *50 U.S.C.A. section 393 (d), 59 U.S.C.A. section 1002, Army Regulation 40, 505, section 2, and the Standard Oil decision.*

By statute, *10 U.S.C.A. sections 609 and 905, 34 U.S.C.A. section 449, 50 U.S.C.A. section 1355 (j),* a member of the Armed Forces is permitted to work for a private employer in specified cases. When he does so, he generally comes within the scope of workmen's compensation acts. This was held in a case arising during the last year even though the soldier had been detailed to perform the services. *Rector v. Cherry Valley Timber Co.,* 13 A.L.R. 1247. Now the performance of services for private employers is usually voluntary.

Any right in the Government to recover for loss of services and expenses on account of injuries to members of the Armed Forces is not based upon an affirmative statute, but is based upon the law of the situs where the event occurred. See the *article by Captain Harbison.* Rules regarding the procedure to be used by the Army in such cases have been laid down in *Army Regulation 25-220,* dated July 3, 1943.

Cases in which the problem dealt with in this sub-committee report can be divided in two general categories. First, cases where the member of the Armed Forces is injured through the tortious act of another person, and, second, cases where the injury is sustained without fault on the part of any person, for example, in the workmen's compensation situation.

Referring to the first type, the right of the Government to recover from the wrongdoer the amount of wages it has paid to the injured person can be based on the common law rule permitting a master to recover damages for the negligent injury of his servant. See *39 Corpus Juris, page 1369* and the English case of *Attorney General vs. Valle-Jones,* 1935, 2 K.B. 216, cited in the Standard Oil decision. This right in the Government is an independent right, separate and distinct from the right of the injured person to recover from the wrongdoer. But it is doubtful whether the Government's right to recover the medical expenses can be based upon the relation of master and servant between the Government and the injured person. At common law there was no duty on the master to furnish medical services to the injured servant. *32 L.R.A., new series, 38.* Such right in the Government, however, can be based upon the principle of law under which when one person is under an obligation to furnish medical services to another person, the former can recover the amount of such medical expense from a third person tortiously injuring the person to whom the duty to furnish is owed, for example, the husband and wife and the parent and child

cases. This right was upheld in the Valle-Jones decision, but the reasoning upon which the court reached this conclusion is very sketchy. Such recovery was also allowed in the Standard Oil case, in which decision the reasons therefor are much more fully and clearly set forth.

It therefore seems that there is little doubt that where a member of the Armed Forces is injured through the negligence of a third party, the Government has a right to recover from such third party the damages to it for loss of services and expenses occasioned by such injury and that this right is an independent right resting in the Government.

Referring to the second type of case, that is, where the member of the Armed Forces is injured without fault on anyone's part, such cases are more common in this war than at previous times because of the larger number of military personnel who have been and are performing services for private employers. The right of the member of the Armed Forces to perform services for a private employer will be found in *10 U.S.C.A. sections 609 and 905* and *34 U.S. C.A. section 449.*

Where a member of the Armed Forces is injured without fault on anyone's part, the Government is under the same obligation to continue to pay his wages and to furnish medical services as where he is injured through the tort of a third person. However, the legal problems are considerably greater where the injury was sustained without the fault of any person. There seems to be no common law analogy through which the Government can be said to have any direct right to recover for loss of services or medical expenses and it would appear that the only basis upon which such right to recover might be founded is the theory of subrogation. According to *60 Corpus Juris, page 697,* subrogation is an equitable principle through which the benefit of remedies is obtained. It is an equitable doctrine and the right thereto is an equitable and not a legal right. Its object is the prevention of injustice and is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice and good conscience, ought to pay it. On the other hand, a subrogee must have equities in his favor and the doctrine is not available if there are countervailing equities. *60 Corpus Juris, page 708.* It is available where an obligation is discharged by one person even though that person and another are each bound to discharge it, but the duty of the person discharging is inferior to the duty of the other person. *60 Corpus Juris, 715.*

It is not clear whether the principle of subrogation would be available to the Government in this situation. Essentially the workmen's compensation acts are based upon public policy. They are not punitive nor do they purport to fully recompense the injured person for all of his damages. The cost of workmen's compensation is recognized as a part of industrial expense and is therefore passed on to the consumer of the goods being produced when the injury occurs. In such case it is difficult to determine whether the paramount equity lies with that part of the public which is made up of the consumers of the goods or with the taxpayers in general who furnish the funds with which the Government operates. It might be noted that, according to cases cited in *60 Corpus Juris, page 706,* the doctrine of subrogation is encouraged and protected, and our courts are inclined to extend its scope.

But even if the principle of subrogation is applicable, problems will arise. For example, ordinarily a subrogee must have extinguished the entire obligation. If the wages paid by the Government to the injured member of the Armed Forces plus the value of the medical services furnished constitute the entire obligation of the employer, this question will not be met. But if they do not, will the Government be subrogated to a part of the injured member's rights under the workman's compensation act? And if so, what procedure will be used?

Again, the usual period during which the member of the Armed Forces performs services for the private employer is short, probably just a few days. If, during this short period, he suffers a serious injury which under the compensation act schedules will entitle him to a large sum of money for both temporary and permanent disability, is it fair and just that the employer be obliged to pay such sum? The injured person is not deprived of wages he could earn during the entire period of disability by reason of the injury alone. He is also prevented from working by reason of that fact that he is in the Armed Forces.

Also, regardless of the disability suffered, he receives his wages from the Government.

Undoubtedly, other similar problems will arise and it would seem that their solution will have to be accomplished through legislation or through litigation or through agreement, depending upon the nature of each problem.

* * *

Respectfully submitted,
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Report Of Fire And Marine Insurance Committee

YOUR Committee on Fire and Marine Insurance, after giving consideration to the manner in which it could best serve the members of our Association who are particularly interested in the above fields of the law, have determined that a digest of the cases handed down subsequent to our last meeting would probably accomplish this purpose We are, therefore, appending hereto such compilation.

In addition, Mr. Stanley Morris has prepared a factual digest of a recent and as yet unreported decision by United States District Judge Ben Moore for the Southern District of West Virginia in the case of *Allemannia Fire Insurance Company v. Winding Gulf Collieries and the Board of Education of the County of Raleigh, West Virginia,* which we believe will be of interest and value.

We have but one suggestion to offer which is that it possibly might be of benefit to the Association if the fields of law presently assigned to this Committee be segregated and assigned to separate committees.

Respectfully submitted,
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* * *

FIRE CASES

Nature, Requisites and Validity of Contract

Grange Mut. Fire Ins. Co. v. Commons, 146 F. (2d) 788 (1st CCA).

Dept. Ins. Ind. v. Merchants Fire Ins. Co., 57 N.E. (2d) 62 (Ind.).

Converse v. Boston Sale etc. Co., 53 N.E. (2d) 841 (Mass.).

Thetford v. Hartford Fire Ins. Co., 183 S.W. (2d) 314.

Bollinger v. Nat'l Fire Ins. Co., 154 P. (2d) 399 (Cal.).

Parkway, Inc. v. U. S. Fire Ins. Co., 58 N.E. (2d) 646 (Mass.).

Construction and Operation

Norwick Union Fire Ins. Co. v. Board of Com'rs New Orleans, 141 F. (2d) 600 (5th CCA).

London Assur. v. Bigeleisen, 39 A. (2d) 494 (N.J.).

Millers Nat. Ins. Co. v. Bunds, 149 P. (2d) 350 (Kan.).

National Union Fire Ins. Co. of Pittsburgh v. Anderson-Prichard Oil Corporation, 141 F. (2d) 443 (10th CCA).

Ia. Electric Co. v. Home Ins. Co., 17 N.W. (2d) 414 (Ia.).

Parkway, Inc. v. U.S. Fire Ins. Co., 58 N.E. (2d) 646 (Mass.).

Home Ins. Co. v. Thomas, 183 S.W. (2d) 600 (Ark.).

Gershcow v. Homeland Ins. Co., 15 N.W. (2d) 88 (Minn.) (Floater Policy).

Premiums, Dues and Assessments

Hoffman v. Neshannock Mut. Fire Ins. Co., 39 A. (2d) 145 (Pa.).

Dept. Ins. N.Y. v. Merchants Fire Ins. Co., 57 N.E. (2d) 62 (Ind.).

Cancellation, Surrender, Abandonment or Rescission of Policy

Fields v. Western Millers Mut. Fire Ins. Co., 50 N.Y.S. (2d) 70.

Sole and Unconditional Ownership

Pheonix Ins. Co. v. Jordan, 184 S.W. (2d) 721 (Tenn.).
Hdwe. Mut. Ins. Co. v. Hieb, Inc., 146 F. (2d) 447 (8th CCA).
Anderson v. Clay Co. Mut. Ins. Co., 16 N.W. (2d) 481 (Neb.).

Loss Adjustment Clause

Buchholz v. U.S.F. Ins. Co., 56 N. E. (2d) 43 (Ct. Appeals N.Y.).

Avoidance or Forfeiture of Policy

Newman v. Firemen's Ins. Co., 154 P. (2d) 451.
Fields v. Western Millers Mut. Fire Ins. Co., 50 N.Y.S. (2d) 70.
Hoffman v. Noshannock Mut. Fire Ins. Co., 39 A. (2d) 145 (Pa.).
Central Mfgs. Mut. Ins. Co. v. Cheek, 18 So. (2d) 806 (Ala.).
Jervis v. Burlington Mut. Fire Ins. Co., 37 A. (2d) 374 (Vt.).
Gipps etc. Corp. v. Central Mfgrs. Mut. Ins. Co., 147 F. (2d) 6 (7th CCA).
Cox v. Owensville etc. Assn., 185 S.W. (2d) 28 (Mo.).
Cooper et al. v. Firemen's Ins. Co., 148 F. (2d) 337 (6th CCA).
Home Ins. Co. v. Thomas, 183 S.W. (2d) 600 (Ark.).
Phoenix Ins. Co. v. Jordan, 184 S.W. (2d) 721 (Tenn.) .

Estoppel, Waiver, Etc.

Summers v. Oakfield Town Mut. Fire Ins. Co., 13 N.W. (2d) 518 (Wis.).
Union Assur. Soc. Limited, of London, England v. Tolivar, 141 F. (2d) 405 (5th CCA).
Hardware Mut. Ins. Co. of Minn. v. Jacob Hieb, Inc., 146 F. (2d) 447 (5th CCA).
Bollinger v. Nat'l Fire Ins. Co., 147 P. (2d) 611 (Cal.).
Prudential Fire Ins. Co. v. Trave-Taylor Co., 152 P. (2d) 273 (Okla.).
Hoffman v. Neshannock Fire Mut. Ins. Co., 39 A. (2d) 145 (Pa.).
Ticonderoga Grange etc. v. Clinton etc. Fire Rel. Assn., 51 N.Y.S. (2d) 474.
Home Ins. Co. v. Thomas, 183 S.W. (2d) 600 (Ark.).
Miller v. Northern Ins. Co., 39 A. (2d) 23 (Del.).

Risks and Causes of Loss

Norwich Union Fire Ins. Soc. v. Board of Com'rs of New Orleans, 141 F. (2d) 600 (5th CCA).
Upington v. Commonwealth Ins. Co., 182 S.W. (2d) 648 (Ky.).

Extent of Loss

Britven v. Occidental Ins. Co., 13 N.W. (2d) 791 (Ia.).
Natl. Union Fire Ins. Co. v. Anderson-Prichard Oil Corp., 141 F. (2d) 443 (10th CCA).
Arcadia Bonded Warehouse Co. v. Natl. Union Fire Ins. Co., 19 So. (2d) 514 (La.).
Phoenix Ins. Co. v. Jordan, 184 S.W. (2d) 721 (Tenn.).

Notice and Proof of Loss

Jervis v. Burlington Mut. Fire Ins. Co., 37 A. (2d) 374 (Vt.).
Georgia House of Interiors v. Glens Falls Ins. Co., 151 P. (2d) 598.
Nathan Miller, Inc. v. Northern Ins. Co., 39 A. (2d) 23 (Del.).
Nichols v. Pearl Assur. Co., 31 S.E. (2d) 127 (Ga.).

Adjustment of Loss

F. & M. Skirt Co. v. R. I. Ins. Co., 55 N.E. (2d) 461 (Mass.).
Syracuse Sav. Bank v. Yorkshire Ins. Co., 49 N.Y.S. (2d) 247.
Sun Life Ins. Office of London v. Ducas, 52 N.Y.S. (2d) 9.
Upington v. Commonwealth Ins. Co., 182 S.W. (2d) 648 (Ky.).

Right to Proceeds

Millers Nat. Ins. Co. v. Bunds, 149 P. (2d) 350 (Kan.).
Langhorne v. Capital Fire Ins. Co., 54 F. Supp. 771.

Arson

Koonts v. Farmers Mut. Ins. Co., 16 N.W. (2d) 20 (Ia.).
Hdwe Mut. Ins. Co. v. Hieb, Inc., 146 F. (2d) 447 (8th CCA).
Queen Ins. Co. v. Elliott, 141 F. (2d) 970 (5th CCA).

Payment or Discharge, Contribution and Subrogation

Gardner v. Freystown Mut. Fire Ins. Co., 37 A. (2d) 535 (Pa.).

Phoenix Ins Co. v. Jordan, 184 S.W. (2d) 721 (Tenn.).

Capital Fire Ins. Co. v. Langhorne, 146 F. (2d) 237 (8th CCA).

City of New York Ins. Co. v. Abraham, 20 So. (2d) 193 (La.).

Suit on Policy, Compliance With Requirements

Anderson v. Clay Co. Mut. Ins. Co., 16 N.W. (2d) 481 (Neb.).

Georgian House of Interiors v. Glens Falls Ins. Co., 151 P. (2d) 598 (Wash.).

Gipps etc. Corp. v. Cent. Mfgrs. Mut. Ins. Co., 147 F. (2d) 6 (7th CCA).

Syracuse Sav. Bank v. Yorkshire Ins. Co., 49 N.Y.S. (2d) 247.

Bollinger v. Natl. Fire Ins. Co., 147 P. (2d) 611 (Cal.).

Pizzolato v. Liverpool & London & Globe Ins. Co., 20 So. (2d) 551.

O'Neal v. Travelers Fire Ins. Co., 48 N.Y.S. (2d) 99.

Seaboard Ins. Co. of Md. v. Caver, 183 S.W. (2d) 922 (Ark.).

Johnson v. Calvert Fire Ins. Co., 183 S.W. (2d) 941 (Ky.).

Nichols v. Pearl Assur. Co., 31 S.E. (2d) 127 (Ga.).

Langhorne v. Capital Fire Ins. Co., 54 F. Supp. 771.

RECENT MARINE CASES

Shaver Forwarding Co. v. Eagle Star Ins. Co., 139 P. (2d) 769 (Ore.).

Levine v. Aetna Ins. Co., 139 F. (2d) 217 (2d CCA).

Defense Supplies Corp. v. U.S. Lines Co., 148 F. (2d) 311 (2d CCA).

Conn. Fire Ins. Co. v. Davison Chemical Corp., 54 F. Supp. 2 (Dis. Ct. Md.).

Link v. General Ins. Co. of America, 56 F. Supp. 275 (Dist. Ct. Wash.).

Battat v. Home Ins. Co., 56 F. Supp. 967 (D.C. Cal.).

Aetna Ins. Co. v. Henry Du Bois Sons Co., 144 F. (2d) 262 (2d CCA).

Davis Yarn Co. v. Brooklyn Yarn Dye Co., 56 N.E. (2d) 564 (N.Y.) (Inland Marine).

Niagara Fire Ins. Co. v. Lowell Trucking Corp., 56 N.E. (2d) 28 (Mass.) (Inland Marine).

DISCUSSION OF CASE OF ALLEMANNIA FIRE INSURANCE CO.

Upon Interpleader

v.

WINDING GULF COLLIERIES and THE BOARD OF EDUCATION OF THE COUNTY OF RALEIGH, W. VA.

By Stanley C. Morris
Charleston, W. Va.

This case, reported in 60 Fed. Supp. 65, involves the proceeds of the insurance which the insurers are ready to pay as a result of the destruction by fire of a public high school building located in Raleigh County, West Virginia. The insurers and the insured, the Board of Education, agreed upon the amount of the loss. In the meantime, Winding Gulf Collieries had served upon the insurers a demand that the proceeds of the insurance be paid to it. The insurers made an agreement between themselves and both claimants of the fund for a test case and brought an interpleader proceeding under the Federal statute. In this case, the United States District Court for the Southern District of West Virginia made findings of fact and reached conclusions of law as follows:

Findings of Fact

The Court makes the following findings of fact in this case:

1. Winding Gulf Colliery Company, predecessor in interest of Winding Gulf Collieries, conveyed the lot on which the Collins High School building was afterwards erected to the Board of Education of the District of Slab Fork in the County of Raleigh, predecessor in interest of the Board of Education of the County of Raleigh, West Virginia, on August 23, 1924, by a deed which included the following language:

> "It is further distinctly understood and agreed by and between the parties hereto as a part of the consideration for this conveyance, that the property hereby conveyed is for public free school purposes only and for no other purpose or purposes and that the same and no part thereof shall at any time be used for any other purpose or purposes whatsoever and that whenever the said property hereby conveyed shall cease to be used for public free school purposes, the same and every part thereof shall thereupon

ipso facto revert to and become re-invested in, the said party of the first part, its successors or assigns in fee simple, with like force and to the same effect as if this conveyance had never been made."

2. It was the intent and understanding of the parties to the deed, which understanding was carried out by the Board of Education, that a high school building would be erected and maintained on the lot. This was the only substantial consideration for the deed.

3. The lot and building were used continuously for public free school purposes from the time the building was erected until it was destroyed by fire on January 5, 1944.

4. In the year 1937 the Board of Education added a gymnasium to the Collins High School building, which addition was built partly on land of Winding Gulf Collieries adjoining the lot conveyed to the Board.

5. On December 1, 1943, the Board of Education insured all its buildings in Raleigh County by means of forty-two blanket policies of fire insurance, all containing exactly similar provisions. In these policies the term "assured" is defined as "The Board of Education of the County of Raleigh as is now or may hereafter be constituted for account of whom it may concern." Loss is made payable to the Board of Education. Other policy provisions are: "This insurance shall not be invalidated by the existence of any mortgage or trust deed or other incumbrance that may now or hereafter be in force affecting the property above described, . . . The Board of Education of the County of Raleigh as may now or hereinafter be constituted, shall be deemed the owner of the property herein named, described and covered by this policy, and no defect in the title to such property shall invalidate this policy in whole or in part.

"Should any of the within described property be situate on lands not owned by the assured in fee simple, this insurance shall not be affected thereby."

6. The entire building was destroyed by fire on January 5, 1944.

7. Immediately after the fire the Board of Education ceased to use the lot for public free school purposes and has not since that time contemplated or intended any further such use of the lot.

8. All the insurance companies concerned have adjusted the amount of the fire loss, the total loss being fixed at the sum of $67,201.02. They have executed and filed in this case an agreement that the decision in this case shall determine the respective rights of the Board of Education and Winding Gulf Collieries in the entire fund. The plaintiff has paid into the Registry of the Court the sum of $4,771.27, being its portion of the adjusted loss.

9. Winding Gulf Collieries, subsequently to the fire, adopted the action of the Board of Education insuring the whole title to the Collins High School building "for account of whom it may concern," and claimed the benefit of the provisions of the blanket policies.

Conclusions of Law

The Court states the following conclusions of law:

1. The Board of Education, through its predecessor in interest, acted within its statutory powers in acquiring the lot, subject to the conditional limitation and automatic reversion upon cessation of use for public free school purposes, set out in the deed.

2. The Board of Education held only such title to the lot and the building thereon as was conveyed to it by the grantor in the deed. Its estate in the property was a conditional fee, subject to the limitation that the property continue to be used for public free school purposes. On cessation of such use the property automatically reverted to the grantor's successor in interest.

3. Under these circumstances, Winding Gulf Collieries was entitled to receive back the land, together with any and all improvements erected thereon. The improvements having been destroyed by fire immediately prior to cessation of use, and the whole title having been insured by the Board of Education, "for account of whom it may concern", and the proceeds of the insurance having been paid into court after the loss occurred, the proceeds stand in place of the improvements. Therefore, Winding Gulf Collieries is entitled to the full amount of the fire loss.

4. For other conclusions of law appli-

cable to the decision in this case, see opinion filed herein upon the motion of the Board of Education to dismiss the answer of Winding Gulf Collieries.

The Board of Education is perfecting an appeal and the case will doubtless later be heard by the Fourth Circuit Court of Appeals. The case has attracted quite widespread interest because it involves a construction of the "for account of whom it may concern" clause in the insurance policies.

Report Of Committee On Health And Accident Insurance

THE 1944 Report of the Committee on Health and Accident Insurance was based on the Health and Accident Insurance Policy Annotations Pamphlet prepared by the American Bar Association Insurance Section Committee of the same year, and it is our understanding that the two reports of the preceding years were based on the status of the then uncompleted work.

The Committee of the American Bar Association on Health and Accident Insurance Law, of which Oliver H. Miller (who is a member of this Committee) served as Chairman, submitted a report which was distributed through the American Bar Association in 1943, and which was very complete down to that date.

Your Committee is advised that a subsequent report containing new decisions will be filed, and in view of the very thorough manner in which this subject is being treated by that Committee it is not deemed advisable to undertake to prepare a detailed report on this subject. The attention of the membership is called to the fact that the report above referred to can be obtained free from the American Bar Association and should be in the hands of all members.

In addition to the foregoing, it may be stated that there have been no unusual questions referred to this Committee for its consideration, and no additional decisions of importance have been called to its attention.

Respectfully submitted,

GROVER T. OWENS, *Chairman*
JOHN D. ANDREWS
PAUL P. CHANEY
LESTER P. DODD
JOHN H. HUGHES
LIONEL P. KRISTELLER
ALVIN R. CHRISTOVICH
WAYNE ELY
OLIVER H. MILLER
Ex-Officio: KENNETH P. GRUBB

Report Of General Legislative Committee

UNDER the policy adopted by the Executive Committee of the International Association of Insurance Counsel, a chairman of General Legislative Committee was appointed, but no other regular members of the committee were designated and the chairman was instructed to call upon any member in any State in which there was proposed legislation, concerning which help of the members of the Association had been properly sought.

Pursuant to instructions received from the President of the Association the chairman communicated with the following organizations:

Association of Casualty and Surety Executives;

American Mutual Alliance;

The Association of Life Insurance Presidents;

American Life Convention;

National Board of Fire Underwriters.

The assisstance of the Association of Insurance Counsel and its members was tendered in connection with legislative matters pending in the various States or in Congress. It was explained that the Association is desirous of promoting the best interests of the insurance business and that it was the function of the General Legislative Committe of the Association to cooperate in the proper influencing of legislation which may be before the various legislative bodies.

The committee has followed the policy of refraining from taking the initiative in legislative matters, but to interest itself only in such matters as the insurance business through their properly constituted representatives request our help.

Legislatures have been in session during the present year in most of the States, but the committee has been impressed that the insurance business has been unusually free from harassing legislative proposals. It would serve no useful purpose to review in detail the work of the committee.

It is a pleasure to report that the insurance business has expressed and shown real appreciation of the willingness and desire of the Association to be of assistance in legislative matters. It has been reassuring to them to know that the Association is alert to the importance of protecting insurance business from harmful and ill-considered legislative proposals, and that throughout the country the members of the Association are standing ready to respond to the call for help whenever such assistance seems proper and advisable.

Respectfully submitted,

CLARENCE F. MERRELL, *Chairman*

Report Of Committee On Life Insurance

THE WAR CLAUSE IN LIFE INSURANCE POLICY

POLICY provisions restricting the liability of a life insurance company when the insured "enters", "enrolls", or "engages" in the military service of the United States have occupied the attention of our courts for many years, with varying results. The Committee feels that a discussion of the clause and the decisions relating thereto is a timely subject.

Companies use different language in their policies, but a typical present provision taken from a policy of one of the leading insurance companies will be found next below:

"In addition to all other conditions set forth therein, said Policy is subject to the following conditions:

The only amount payable under this Policy shall be the restricted amount hereinafter defined if the death of the Insured shall occur under the circumstances set forth in any one or more of the following clauses (1), (2), (3) or (4), namely

(1) outside the Home Areas while the Insured is in the military, naval or air forces of any country engaged in the war;

(2) inside the Home Areas as a result of service outside the Home Areas in the military, naval or air forces of any country engaged in war and within six months after the termination of such service;

(3) as a result of operating or riding in any kind of aircraft (including falling or otherwise descending from or with any such aircraft in flight) other than as a fare-paying passenger of a commercial airline and flying on a regularly scheduled route;

(4) within two years from the date of issue of this Policy as a result of war, provided the cause of death occurs while the Insured is outside the Home Areas and the Insured dies either outside the Home Areas or within six months after returning to the Home Areas.

"Said restricted amount shall be a sum equal to the premiums for this Policy which shall have fallen due prior to the date of death of the Insured and been paid to and received by the Company, together with compound interest at the rate of three per cent per annum, plus the reserve on any outstanding dividend additions, and any outstanding dividends, including dividend accumulations, and less any indebtedness hereon."

General Rules Affecting the Liability or Non-Liability of a Life Insurance Company

A provision in an insurance policy exempting the insurer from liability, or limiting the same, in case of death while in the military service of the country, is valid and is not unreasonable or against public pol-

icy[1] although it might be void for uncertainty, or inapplicability.[2]

Provisions in insurance policies exempting the insurer from, or limiting, liability for injuries or death while insured is in the military or naval service, if ambiguous or of doubtful meaning, will be construed against the insured. Such provisions will not be liberally construed in favor of the insured.[3]

The general rules of validity and construction are not affected by the fact that the insured was drafted into the service,[4] since a limitation or exception will apply equally to persons inducted into service, as to those who voluntarily enlist,[5] especially where the policy does not differentiate between voluntary and involuntary service.[6]

The clause "death while engaged in military service at time of war" within the meaning of the exception in a life policy means death while doing, performing, or taking part in some military service in time of war; in other words, death while performing some duty in the military service in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service.[7]

The exception in a policy insuring "against death from any cause, except military or naval service in time of war", means death incident to, caused by or especially connected with, military or naval service, that is, dangers inherent in such service in time of war, and not death from causes to which civilians also are subject, such as disease, although contracted in a training camp.[8]

If a policy contains no inhibitions against the insured engaging in military service, as where it merely excepts the killing of one while so engaged from a double indemnity provision, so that the cause of death and not the insured's *status* as a soldier, determines the exemption from double indemnity, there is liability for double indemnity if the death of the insured was not the result of military service, or if it was not caused directly or indirectly, wholly or partly, by war or some act incident thereto, although the insured died while in the military service of his country.[9]

It has been declared that where the *status* of the insured, and not the cause of death, furnishes the ground of exception, as where the policy provides that the insurer does not assume risk of death which shall occur while the insured is engaged in military service, or will not be liable for such death, the insurer is exempted, notwithstanding that death did not result from any hazard peculiar to such service.[10]

And where the policy limits liability in the event the insured "engages in military service in time of war" or should "engage in the occupation of a soldier in time of war", it has been held that the test of the restriction of liability is the *status* of the insured, and not the character of the service, so that liability is limited where insured after entry into service, died of a disease although not in the battle area.[11]

It has been held that an insured has entered the "military service" where he has passed the examination, taken the oath, enrolled as a soldier, and became subject to the orders of the military branch of the Government.[12]

As stated earlier in this paper, many decisions of the courts of the land have been rendered and with varying results. Illustrative: It has been held that a provision exempting from liability "while in the military or naval service in time of war" does not exempt in case of death resulting from an accident received while on furlough,[13] or where death results from disease contracted while in a military training camp, such as influenza, the said disease being an

[1] Miller v. Ill. B. L. Asso., (Ark.), 212 S.W. 310; Railey v. U. L. L. & A. Ins. Co., (Ga.), 106 S.E. 203; Swanson v. Prov. Ins. Co., (Ia.), 188 N.W. 677; Ruddock v. Det. L. Ins. Co. (Mich.), 177 N.W. 242; Reid v. Am. N. Assur. Co. (Mo.), 218 S.W. 957; Long v. St. Joseph's L. Ins. Co. (Mo.), 225 S.W. 106.

[2] Arendt v. No. Am. L. Ins. Co. (Neb.), 187 N.W. 65.

[3] Schroeder v. Amalgamated Asso. (La.), 95 So. 389.

[4] Railey v. U.S.L. & A. Ins. Co. (Ga.), 106 S.E. 203.

[5] Bradshaw v. Farmers & B.L. Ins. Co. (Kans.), 193 P. 332.

[6] Ruddock v. Det. L. Ins. Co. (Mich.) 177 N.W. 242.

[7] Benham v. Am. C. L. Ins. Co. (Ark.), 217 S.W. 462.

[8] Arendt v. No. Am. L. Ins. Co. (Neb.), 187 N.W. 65.

[9] Johnson v. Mut. L. Ins. Co. (Ga.), 115 S.E. 14.

[10] Johnson v. Mut. L. Ins. Co. (Ga.), 115 S.E. 14.

[11] Olson v. Grand Lodge A.O.U.W. (No. Dak.), 184 N.W. 7.

[12] Slaughter v. Protective L. L. Ins. Co. (Mo.), 223 S.W. 819.

[13] Atkinson v. Ind. N. L. Ins. Co. (Ind.), 132 N.E. 263.

epidemic which is common to both the civil and military.[14]

It has also been held that the exempting clause "death while engaged in military service" was not sufficient to bar recovery for death of a soldier who died from a prevalent disease while in an Army camp in training.[15]

The phrase "engaged in military or naval service in time of war" has been declared to denote such service as would increase the risk or hazard of the insurer and did not cover death from pneumonia contracted while en route to the zone of hostilities while waiting at the port of debarkation.[16]

It has also been held that a policy limiting liability, if insured entered military service without paying an additional premium, in case of death, "in consequence of such service and without the company's permit", does not limit liability except where death occurred in consequence of such service, if the death occurred from a common disease after the soldier arrived in England on his way to the battle zone.[17]

It has also been held that death from disease contracted by one who had enlisted in the military service of the United States Government and en route to a training camp was not a death which occurred "while engaged in military or naval service."[18]

It has been further held that the phrase "die as the result of military or naval service in time of war" applies to combatant service only and did not bar recovery for death resulting from accidental discharge of a gun.[19]

It has also been held that death from pneumonia while in the military service outside of the United States is within a provision limiting liability if insured shall engage in military service outside the country,[20] and death from infection following amputation necessitated by a battle wound in the leg was within a provision limiting liability "if the insured die while occupying a military status, or as the result of having occupied such a status."

Provisions exempting the insurer from liability under the so-called military clauses may, like other provisions which are inserted in policies of insurance for the benefit of the insurer, be waived by it so as to render it liable for injury or death arising from entry into or engagement in war-like operations.

* * * * *

A search of the authorities pertaining to this subject reveals that the courts have given great consideration to the effect of language in policies creating an exemption from liability on the part of the insurer, where insured is in the military service at the time of his death. These decisions, of course, vary with the language of the contracts. For the most part, they fall into two general lines.

In one line of cases the language generally used in defining the exemption from liability is that at the time of death the insured shall have been "engaged in military service". In some of these cases other language may be used but it must have the same effect, that of requiring that the death must have been suffered in the course of actual military activity. Therefore, the decisions on this line are generally to the effect that exemption of the insurer from liability arises only where a "causal relation" is shown to exist between the military service and the death.

In the other line of cases the language generally used in defining such exemption is that "death shall not have resulted from bodily injuries sustained while the insured is in the military or naval service in time of war." Generally the decisions hold that in the case of contracts using this language the exemption arises from the *status* of one inducted into the military service and not yet discharged therefrom at the time of his death. It does not depend upon any causal connection between the death and any form of military activity.

Typical of the line of cases first mentioned above and using the term "engaged in military service" is that of *Benham v.*

[14]Nutt v. Sec. L. Ins. Co. (Ark.), 218 S.W. 675; Starr v. Gr. Am. L. Ins. Co. (Kans.), 219 P. 514; Stephan v. Prairie Life Ins. Co. (Neb.), 203 N.W. 626.

[15]Farmers N. L. Ins. Co. v. Carman (Ind.), 132 N.E. 697.

[16]Barnett v. Merch. L. Ins. Co. (Okla.), 208 Pac. 271.

[17]Gorder v. Linc. N. L. Ins. Co. (No. Dak.), 180 N.W. 514.

[18]Benham v. Am. C. L. Ins. Co. (Ark.), 217 S.W. 462.

[19]McCahey v. John Hancock M. L. Ins. Co., 27 Pa. Dist. R. 603.

[20]Swanson v. Prov. Ins. Co. (Ia.), 188 N.W. 677.

American Central Life Insurance Company (Ark.) 217 S.W. 462. Note the crystal clear language of the court in interpreting the meaning of the policy provision there under consideration, "death while engaged in military service in time of war." The court said:

"The words in the restricted clause now under consideration mean something more than death to the insured during the period of time he was in military service of the United States. The word 'engaged' denotes action. It means to take part in. To illustrate, a servant injured while in the operation of a train means that he must be injured while assisting or taking part in the operation of the train. An officer engaged in the discharge of the duties of his office is one performing the duties of his office. So here the words, 'death while engaged in military service in time of war' means death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service. That is to say, in order to exempt the company from liability, the death must have been caused while the insured was doing something connected with the military service, in contradistinction to death while in the service due to causes entirely or wholly unconnected with such service. This construction, we think, would be according to the natural and ordinary meaning of the words. By the use of the word 'engage' it must have been intended that some activity in the service should have caused the death, in contradistinction to merely a period of time while the insured was in the service."

Another case, *Long v. St. Joseph's Life Insurance Co.*, 225 S.W. 106 (Mo.), clearly recognizes the distinction between "while engaged in military service" and "while the insured is in the military or naval service in time of war." The insured enlisted in the Naval Reserve in 1918 and trained for actual participation in hostilities of war. On November 25, 1918, he was granted a furlough and went to his home in Missouri and there died from influenza. The application signed by the insured contained the following provision:

"It is hereby understood and agreed * * * that, in case of my death while engaged in any military or naval service in time of war, to accept in full settlement of this policy the total premiums paid to the Company with 5% interest added for the time the Company has had the use of my money."

The policy provided:

"Provided, however, that it is expressly understood and agreed that, in case of the death of the insured while engaged in any military or naval service in time of war, the beneficiary or beneficiaries hereunder shall accept, in full settlement of this policy, a sum equal to the total premiums paid by the insured, etc."

The Court, in permitting recovery, said:

"Now, if it was desired to express one thought that liability would be reduced if death occurred at any time during the period of insured's service, from the date of entrance therein to down to the date of his discharge, why was the word 'engaged' used? If insured's mere status of being an enlisted soldier or sailor at the time of his death is to give effect to the clause and reduce liability, what necessity existed for saying therein that death must occur while insured is 'engaged' in any such service? The usual and ordinary, if not the universal, way of expressing a man's status in that regard, where no idea or thought of what he is doing therein is intended, is to say that he 'is in the service', not that he 'is engaged in the service.' * * *"

"If the clause in the insurance contract before us means what appellant contends it does, why was it not made to read 'in case of the death of the insured while in the service' etc.? Had it said this, or had it read that if insured died 'after having entered the military service or naval service and before his discharge therefrom,' there could be no doubt but that the clause had reference to the period of insured's service or his mere status in that regard. But, instead of doing this, it says 'in case of insured's death while engaged in any military or naval service.' The word 'engaged' has various meanings according to the subject matter to which it is applied or the connection in which it is used. As applied to military or naval service, the word 'engaged' denotes ac-

tion or participation in something being done in that service. * * *"

Typical of the other line of cases where the exempting provision denotes *status* rather than *causal connection* between death in military service or actual participation in military service, is the often cited case of *Miller v. Illinois Bankers' Life* Ass'n, 212 S.W. 310 (Ark.). The clause in the insurance contract in this case, with reference to the effect of military service, was as follows:

> "It is expressly provided that death while in the service of the Army or Navy of the Government in time of war is not a risk at any time during the continuation or reinstatement of this policy for any greater sum than the amounts actually paid to the Company thereon."

The insured was inducted into the military service. He died of pneumonia in camp after his induction. In the opinion the following language is found:

> "An insurance company has the right to select the particular risk it is willing to assume and there is no public policy against a contract of this sort exempting the insurance company in advance from liability for death of the insured while in the military or naval service of the Government."

And further:

> "There was no forfeiture provided for at all, but the company had, as above stated, the right to stipulate under what circumstances it should be liable. The assured had the right to pay the premium and continue the policy in force while he was in the military service of the government, notwithstanding the exemption of the company from liability 'for death occurring during the period of that service'."

In determining that the *status* of the assured was the controlling element, the Court said:

> "The death of the assured occurred while he was *in* the military service of this Government during the period of the war with the Central Powers of Europe."

The language was held to have created a *status.*

This principle is enunciated in many cases.

Bending v. Metropolitan Life Insurance Co., 58 N.E. 2d 71 (Ohio). Robert L. Bending was inducted into the military service of the United States. He carried an accident insurance policy with the Metropolitan. The policy in question was issued as a supplemental contract to a standard life policy for $1000 which was issued at the same time, which contained no military clause and the proceeds of which were paid by the defendant company to the beneficiary. The provision in the supplemental contract was as follows:

> "The Company hereby agrees to pay . . . provided . . . that death shall not have resulted from bodily injuries sustained while participating in aviation . . . nor sustained while the insured is in the military or naval service in time of war."

It provided further that the supplemental contract should be suspended while the insured was in the military or naval service in time of war.

In June, 1943, Bending was stationed at Fort Bliss, Texas. He obtained a leave of absence and while at a hotel in El Paso was accidentally killed by falling out of a window. The defendant declined liability, setting up the military exemption clause as a complete bar to recovery. The trial court found that there was no right of recovery although it was argued that one is not in military service while on leave of absence. The court said:

> "One is in the military service from the time he takes the oath until he receives his discharge, honorably or otherwise."

The court held:

> "A provision of an accident policy that insurance should be suspended while insured was 'in the military service in time of war', made status and not activities of insured in military service ground of exemption from liability, and insurer was not liable for accidental death of insured soldier while on two-day leave of absence, since one is in military service from time he takes the oath until discharge."

Life & Casualty Insurance Co. v. McLeod, 27 S.E. 2d 871 (Ga.). The insured, James L. McLeod, after the issuance of a policy containing double indemnity provision, entered the naval service of the United States while the United States of Ameri-

ca was in actual war with Germany and other Axis powers. The accidental death benefit feature of the policy provided, among other things:

> "Nor if death is caused or contributed to directly or indirectly or wholly or partially by disease or by bodily or mental infirmity nor if death result from bodily injuries sustained while participating in aviation or aeronautics, as a passenger or otherwise, *or while insured is in the military or naval service in time of war.*"

In December, 1942, the insured had a personal encounter with another, during which encounter he was fatally stabbed and died from his wounds the next day. At the time of McLeod's death he was not on active duty but was visiting his parents in Georgia while on leave or furlough from the United States Navy and the personal encounter resulting in his death did not grow out of or happen in connection with any duty then being performed by him in the United States Navy. In this case the court held that the plaintiff beneficiary was only entitled to recover the net reserve of the policy because of the language of the provision exempting the company from other liability beyond the net reserve.

Lindsey v. Life & Casualty Insurance Company, 27 S.E. 2d 877 (Ga.), decided against recovery on the authority of Life & Casualty Company v. McLeod, supra.

Recent Novel Cases Involving Double Indemnity, Accident Policies and The Aviation Clause.

Stankus v. New York Life Insurance Co., 44 N.E. 2d 687 (Mass.). The action was to recover under the double indemnity provision. The policy provided for the payment of said indemnity "upon receipt of due proof, etc.", and provided further:

> "However, that such double indemnity shall not be payable if the insured's death resulted directly or indirectly from . . . (d) war or any incident thereto."

There was recovery and upon appeal the Supreme Judicial Court of Massachusetts reversed the decision.

Anthony Stankus was a seaman in the United States Navy and a member of the crew of the U.S.S. Reuben James and was lost at sea when the vessel was on convoy patrol and sunk by enemy torpedo action on the night of October 30, 1941. The plaintiff contended that the policy exempts only a death that results from a war in which the United States was a participant and that as this Government was not engaged in any war on October 30, 1941, then the death of the insured could not have resulted from a war as that term was employed in the policy. The court in its opinion said:

> "But existence of a war is not dependent upon a formal declaration of war. Wars are being waged today that began without any declaration of war. The attack by the Japanese on Pearl Harbor on December 7, 1941, is the latest illustration. . . . But it is not necessary in the view we take of this cause to determine from the character of events that were occurring in the North Atlantic prior to the sinking of the Reuben James whether any actual state of war existed between the United States and any other nation, because we are of the opinion that the meaning of the term 'war' as used in the policy cannot be restricted to one that was being waged by the United States and in which the insured was actively engaged as the plaintiff contends. . . . The term 'war' is not limited, restricted or modified by anything appearing in the policy. It refers to no particular type or kind of war but applies in general to every situation that ordinary people would regard as war. The sinking by German or Italian submarines of ships belonging to a belligerent nation or of ships of another nation convoying war materials and supplies to a belligerent nation is the usual result of waging war by one nation against another . . . It follows that the death of the insured arose directly or indirectly from war and was not a risk covered by the double indemnity provisions of the policy."

However, a different result was reached by the South Carolina court in *West v. Palmetto State Life Insurance Co.,* 25 S.E. 2d 475 (S.C.). The life of Broadus West was insured under two policies issued by the insurer. They contained provisions for double indemnity in case of accidental death, but provided that such would not be applicable in the event that death should occur while the insured was "engaged in military or naval service in time

of war" and provided for the usual reduction of liability of the company in such case.

West was a seaman in the United States Navy and was killed at Pearl Harbor on December 7, 1941, by Japanese bombers. Introduced in evidence was the Congressional Declaration of War against Japan. It was the resolution passed on December 8, 1941, the day after the well-known sneak attack by Japan on Pearl Harbor. The insurance company recognized the narrow view of the issue presented and in the opening paragraph of its printed brief said:

> "The only real question for the consideration of the court is whether on December 7, 1941, the United States of America was at war."

It was said by the court:

> "Judicial notice was taken of the fact that at the time of the attack high diplomatic representatives of Japan were in conference with the President and Secretary of State of this nation, professedly in an effort to preserve peace, from which and the other facts of record it was found that a state of war did not exist between the two nations and that war is 'the state of nations among whom there is an interruption of all pacific relations, and a general contention by force authorized by the sovereign; that the Constitution of the United States, Article I, Section 8, provides that Congress shall have power to declare war; that the court cannot, however, take judicial notice of a war by its Government until there has been some act or declaration creating or recognizing the existence of war by the department of Government clothed with the war-making power."

In affirming the judgment in favor of the beneficiary, the South Carolina court held that at the time West was killed the United States "was not at war", and that the policy provision did not bar recovery.

Rosenau v. Idaho Mutual Benefit Association, 145 P. 2d 227. Howard A. Rosenau died on December 7, 1941, while a member of the armed forces in the military service of the United States of America in the Hawaiian Islands as the result of the Japanese attack on that day. The policy in question had this provision:

> "This policy does not cover death, disability or other loss sustained while in military, naval or air service of any country at war."

It further provided that the liability of the association in such event would be only for the return of the amount of the premiums paid on the policy. The court found that the sole question for decision was whether or not the United States was at war when the Japanese began the unprovoked attack on the Hawaiian Islands on December 7, 1941.

In a very exhaustive opinion and also relying upon the authority of West v. Palmetto State Life Insurance Co., supra, the court held that the policy provision did not exempt the company from full liability for the reason that the United States was "not at war."

Bending v. Metropolitan Life Insurance Co., supra. Discussion elsewhere herein.

Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620. Suit on life policy, face value $2,500, and on double indemnity feature in the event of accidental death.

The insured, while serving as an ensign in the United States Navy, was killed by the attack of the Japanese at Pearl Harbor on December 7, 1941. The policy excluded "death resulting from war or any act incident thereto." The court in stating the issue said: "Did death result from war or any act incident thereto?" In affirming judgment for the plaintiff, the Louisiana court held:

> "The death of insured, an ensign in the Navy, which occurred during and as the result of the Japanese attack on Pearl Harbor, December 7, 1941, was an 'accidental death' by external and violent means within meaning of double indemnity provision of life policy, and was not death resulting from 'war' or any act incident thereto within meaning of policy provision excluding such death from double indemnity coverage."

Bull v. Sun Life Assur. Co. of Canada, 141 F. 2d 456 (7th CCA). The insured, Richard Bull, made application for a policy while a naval aviation cadet in training at Pensacola, Fla. The insurance company, knowing these facts, required Bull to sign an endorsement containing the aviation provision and to agree that this provision should become a part of the contract of insurance. The policy provided:

"Death as a result, directly or indirectly, of service, travel, or flight in any species of aircraft, as a passenger or otherwise, is a risk not assumed under this policy."

On February 5, 1942, Bull, then a Lieutenant (j.g.) in the United States Naval Reserve, was pilot of a seaplane engaged in routine patrol duty in the South Pacific. While bombing Jap ships at anchor off the Dutch East Indies, the plane was disabled by anti-aircraft fire and fire from Jap zeros. Bull was forced to make a landing on the water about 1,000 yards from the island of Amboina. The plane did not crash but after landing it could not have flown again without repairs. Members of the crew, to escape a Jap strafing plane, dived into the water. Bull was last seen on the wing of the disabled plane, trying to launch a rubber boat. The first strafing attack was not successful and the Jap returned for a second attack. The members of the crew who had already gone into the water last saw Bull on the tip of the wing as the Jap plane moved in for the second attack. These men were submerged in the water to escape the fire and upon coming to the surface, Lieutenant Bull was not seen again by them and the plane was gone.

The question presented was: "Did Lieutenant Bull meet his death as a result, directly or indirectly, of service, travel or flight in the seaplane?"

There was no war clause inserted in the policy. The court, in affirming judgment for the beneficiary, said:

"We hold that disengagement from service, travel, and flight in that seaplane had taken place in the case at bar, and that Lieutenant Bull's death had no connection, directly or indirectly, with service, travel, or flight in that seaplane within the meaning of the policy. . . . We think the true intent of the parties was to exclude the risks of aviation and to include the risks of war. The death in this case was due solely to dangers inherent in a war risk."

A different result was reached in *Green v. Mutual Ben. Life Ins. Co.*, 144 F. 2d 55 (1st CCA). Here, Bartlett Green was issued a policy containing the aviation clause as follows:

"Death occurring by reason of any aerial flight or journey is not a risk assumed by the Company, except to the extent of the entire reserve, less any indebtedness, on this Policy, or on any Extended Insurance hereunder. If the Insured at the time of such flight shall be a fare-paying passenger in course of transportation from one definite terminal to another by means of an aerial conveyance in charge of a licensed pilot, this provision shall not be effective."

Green enlisted in the United States Naval Reserve on March 28, 1942, as a seaman second class. Later he was appointed an aviation cadet and was in training in Glenview, Illinois. He was piloting a SBD type airplane on April 13, 1943. Acting under orders and in line of duty, he was engaged with four other planes of the same type in carrier landing aboard the U.S.S. Wolverine. He encountered trouble, radioed the mother ship of his difficulty and that he was about to make a forced landing in the water, at 11:10 a.m. At 1:55 p.m. an oil slick was sighted in the water, and at 2:05 p.m. a semi-inflated life raft was seen. Shortly thereafter Green's body was discovered in the water, dead. The court, in affirming a judgment for the defendant company, held:

"Where death of insured who was a naval cadet occurred when insured made a controlled forced landing and became separated from his life raft before he could inflate it and secure it to his person, insured was engaged in an 'aerial flight' at time of his death within meaning of aviation clause in life policy excluding death occurring by reason of any aerial flight.

"Fact that life policy did not include a military risk exclusion clause, did not establish that the aviation clause in policy excluding death occurring by reason of any aerial flight was intended to exclude from coverage only the risks attendant upon civil aeronautics training and flight, and not the risks contingent upon military service.

"Where death of insured who was a naval aviation cadet occurred when insured made a controlled forced landing and became separated from his life raft before he could inflate it and secure it to his person, proximate cause of insured's death was the aerial flight, within meaning of aviation clause in life policy

excluding death occurring by reason of aerial flight, notwithstanding fact that proper protective or rescue measures might have succeeded in surmounting the risk."

Schifter v. Commercial Travelers Mut. Acc. Ass'n, 50 N.Y. Supp. 2d 376 (N.Y.). The insured, Samuel Schifter, became a member of the defendant association and was issued a certificate wherein a beneficiary was named and the company agreed to pay $5,000 in case of accident occurring prior to the age of 70 "if the assured lost his life resulting directly and independently of disease, bodily infirmity or any other cause from bodily injuries effected solely and exclusively by external, violent and accidental means", and provided also:

"The insurance under this contract does not cover:

"(d) while he is making or taking an aerial flight of any kind except as a passenger holding a ticket or pass in a licensed commercial aircraft provided by an incorporated common carrier legally and actually operated by a licensed transport pilot upon a regular route pursuant to the published schedule to transport passengers from one airport to other airports on said route."

However, an endorsement was placed upon the policy as follows:

". . . regardless of those provisions which except from payment any claims arising where he has changed to a hazardous occupation or has entered the armed forces of the Nation in time of war, so long as: . . ."

Schifter entered the military service of the United States on January 3, 1943, and was assigned to the 307th Army Air Forces Training Detachment of the Air Corps in Texas. He died in military service on November 15, 1943, in Texas as a result of bodily injuries effected solely and exclusively by external, violent and accidental means as a result of the crash of a plane in which he was taking an aerial training flight. In view of the endorsement above quoted, the court ordered judgment for the beneficiary for the full amount of the policy.

A similar result was reached in *Young v. Life & Casualty Insurance Co. of Tenn.* 29 S.E. (2d) 482. The insured, Ernest Colvin, was enrolled in the Army of the United States in 1942 when the country was actively engaged in war. He died on December 24, 1942, shortly after his induction into the military service. Death resulted from an automobile accident while he was visiting relatives in South Carolina. It was admitted that his death had no causal connection with military service and that it occurred at a time when he was on furlough from the Army. The provision in the policy with reference to accidental death provided, in part:

"Nor if death results from bodily injuries sustained while participating in aviation or aeronautics as a passenger or otherwise or while insured is in military or naval service in time of war."

The provision in the policy with reference to military and naval service required that a written permit must be obtained from the company for such military service and an extra premium was required to be paid and that if the insured died while enrolled in such service in war time, without such permit, the company's liability would be restricted to the net reserve on the policy.

The insured did not obtain a written permit from the company for such service nor did he pay an extra premium. The insurer maintained that the status of the insured prevented recovery. The beneficiary contended that *status* did not apply but that the parties intended to agree only, *that if the insured's death resulted from his participation in military service, then the double indemnity benefit could not be recovered.* The South Carolina court took the view that there was no "causal connection" between the accident and the military service of the insured and permitted recovery.

RECENT CASES

Barringer v. Prudential Ins. Co., Insurance Law Reports, Vol. 10, No. 40, 5/2/45, Page 843.

Badanjak v. Metropolitan Life Ins. Co., 50 D. & C. Reports 559 (1944).

Bending v. Metropolitan Life Ins. Co., 58 N.E. (2d) 71.

Eggena v. New York Life, Supreme Court, Iowa, decided 5/8/45.

Green v. Mutual Benefit Life, 114 Fed. (2d) 551.

Hyfer v. Metropolitan Life Ins. Co., Supreme Judicial Court, Mass., decided May 3, 1945.
Life & Casualty Ins. Co. v. McLeod, 27 S.E. (2d) 871.
Lindsey v. Life & Casualty Ins. Co., 27 S. E. (2d) 877.
Newcomb v. Victory Life Ins. Co., 157 Pac. (2d) 527.
Pang v. Sun Life Assur. Co., Commerce Clearing House Serv. 10 Life Cases 174.
Paradies v. Travelers Ins. Co., 52 N.Y.S. (2d) 290.
Rosenau v. Idaho Mut. Ben. Ass'n, 145 P. (2d) 227.
Savage v. Sun Life Assur. Co., 57 F.S. 620.
Schifter v. Commercial Trav. Mut. Acc. Ass'n, 50 N.Y.S. (2d) 376.
Smith v. Sovereign Camp, W.O.W., 28 S. E. (2d) 808.
State Mutual v. Harmon, 33 S.E. (2d) 105.
Stankus v. New York Life, 44 N.E. (2d) 687.
Thorne v. Penn. Mut. Life Ins. Co., American Life Convention Legal Bulletin, Feb. 1945, Page 58, Court of Common Pleas, Penn. Oct. 1944.
West v. Palmetto State Life Ins. Co., 25 S.E. (2d) 475.
Western & Southern Life Ins. Co. v. Brueggeman, 55 N.E. (2d) 719.
Young v. Life & Casualty Ins. Co., 29 S.E. (2d) 482.
See annotations: 153 ALR 1418; 152 ALR 1449; 150 ALR 1414; 147 ALR 1294; 137 ALR 1263; 15 ALR 1280; 11 ALR 1103; 7 ALR 382; 4 ALR 848.

Respectfully submitted,

JOHN L. BARTON, *Chairman*
T. DEWITT DODSON
HOBART GROOMS
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Ex-Officio: PAUL J. MCGOUGH

Report Of Committee On Practice And Procedure

FOR the last five years, your Committee on Practice and Procedure has devoted most of its time to a study of the Federal Rules of Civil Procedure. It has been the hope of your present chairman and of several other members of the Committee, that this year we might turn our attention to other practice and procedure questions of general interest to the members of the Association. However, recent developments make it necessary that your Committee, during the next few months, devote itself to a study of certain proposed amendments to the Federal Rules of Civil Procedure.

During the years 1942 and 1943, your Committee made an extensive study of these Federal Rules, with a view of proposing such amendments as seemed necessary or advisable. In the report published in the July, 1943, issue of the *Journal*, your Committee recommended amendments to Rules 6, 14, 34, 36, 49, 52, 58, 59, 62, 73; and these recommendations were transmitted to the Advisory Committee on Rules for Civil Procedure, which had theretofore been appointed by the United States Supreme Court.

In May, 1944, the Advisory Committee on Rules for Civil Procedure published a Preliminary Draft of Proposed Amendments affecting more than forty different Rules. Some of the more important of these proposed amendments were the subject of study by your Committee last year. Our open forum at last year's convention was devoted exclusively to a discussion of this Preliminary Draft, particular attention being given to the proposed amendments to Rules 14, 30, 33, 34, 41, 45, 50, 54, and 56. See the *Insurance Counsel Journal* for October, 1944, pp. 32-58. Copies of the October, 1944, report of the Committee on Practice and Procedure were forwarded to the members of the Supreme Court's Advisory Committee.

The Advisory Committee having received numerous criticisms, recommendations, and suggestions from members of the Bench and Bar throughout the United States, that committee met in January, 1945, and reviewed the proposed amendments contained in its Preliminary Draft. Following this meeting, the Advisory Committee prepared a Second Preliminary Draft of Proposed Amendments; this Second Preliminary Draft is now about ready to be printed,

and it is expected that copies thereof will soon be available for distribution to the Bench and Bar generally. Your chairman has been advised that the Advisory Committee will meet again in the fall of 1945 to consider such criticisms, recommendations, and suggestions regarding the Second Preliminary Draft as shall have been communicated to the Advisory Committee by the legal profession; thereafter, the Advisory Committee hopes to complete its final draft of proposed amendments for submission to the United States Supreme Court.

In view of the foregoing developments, your Committee feels that it is of paramount importance to the members of our Association, as well as to the Bench and Bar generally, that we carefully consider this Second Preliminary Draft of Proposed Amendments which has just been prepared by the Supreme Court's Advisory Committee. Consequently, your Committee on Practice and Procedure plans to devote itself exclusively, during the next few months, to a thorough study and discussion of this Second Preliminary Draft. In the event that our Association holds its annual meeting in September, an interesting round table discussion of this Second Preliminary Draft will be presented; if the annual meeting is not held, it is hoped that a two or three day meeting of the Committee can be arranged in order that an agreement may be reached as to the recommendations which this Association should make to the Supreme Court's Advisory Committee regarding the Second Preliminary Draft of Proposed Amendments.

All the members of the Association are urged to study the Second Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure *at the earliest possible time* and to submit *promptly* their criticisms, recommendations, and suggestions in triplicate, to the chairman of your Committee on Practice and Procedure. Copies of the Second Preliminary Draft of Proposed Amendments may be secured by addressing: "Advisory Committee on Rules for Civil Procedure, Supreme Court of the United States Building, Washington 13, D. C."

Respectfully submitted,

WAYNE E. STICHTER, *Chairman*
WILLIAM H. FREEMAN
J. A. GOOCH
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Ex-Officio: CLARENCE W. HEYL

Report Of Committee On Unlawful Practice Of Law

THIS Committee was not called upon to meet during the past year by reason of the fact that no complaints have been made to it and no matters requiring the consideration of the Committee have been called to the attention of the Committee.

Consequently, until some problems arise which may properly be considered by your Committee they report "Progress". Your Committee is ready, willing, and able to act when the occasion for the exertion of its efforts shall arise.

Respectfully submitted,

MELVIN H. ZURETT, *Chairman*
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Report Of Committee On Workmen's Compensation And Unemployment Insurance

EFFECT OF WAGE FLUCTUATIONS ON COMPENSATION UNDER WORKMEN'S COMPENSATION ACTS

THE Committee on Workmen's Compensation, after consideration of a number of subjects, chose as the basis for its report the examination of the effect of fluctuation of wages by reason of economic forces on compensation under the various Workmen's Compensation Acts because of its current as well as future interest to the members of the Association.

At the present time we are in a period of inflated wages and earnings which happens in any war-time economy. This is true in its broadest meaning, but unfortunately it is also true in a more limited sense in that in many fields there is no economic basis or justification for the wage paid as related to the skill required to do the particular job. We have witnessed an influx of inexperienced, unskilled and untrained workers to industry who are being paid wages completely out of proportion to their skill based on pre-war standards. If the amount of wages paid be any criterion of skill, then the country at the present time has probably more skilled workers than at any time in its history.

It is not unreasonable to assume that claims for workmen's compensation will increase with the decrease of economic activity and industrial employment. Likewise it is logical to anticipate that efforts will be made by claimants in the future to attribute their inability to work to injuries, real or fancied, incurred during the present time of high wages rather than to the real cause, viz., lack of jobs. It is evident that we must be on the alert to guard against the use by some claimants of the benefits of the various Workmen's Compensation Acts as a more remunerative source of income than unemployment insurance.

It, therefore, becomes pertinent to consider the effect of wage fluctuations not only in view of the present high wage levels, but also in the light of what will develop in the post-war era when the law of supply and demand for labor will not be influenced by the stimulation of war and wartime controls. Of present interest is the right to compensation when an employee earns as much as, or more than, before the injury, because of a general wage increase; of future concern is the effect on workmen's compensation payments of a lowering of the general wage scale. These two propositions are closely related and involve the ultimate consideration of how much effect is given by the courts to fluctuations in wage levels.

As is true of most subjects involving Workmen's Compensation, every case must be considered in the light of the particular statute of each state. The committee does not present this report as an exhaustive and complete analysis of all cases relating to the problem under discussion, but we have endeavored to study the general trend to ascertain the attitude of the courts on this subject.

The statutory enactments providing for compensation usually make the amount of compensation to be paid the injured employee dependent either on the average earnings of the employee at the time of the injury, or on the impairment of his earning capacity, or provide for the payment of fixed sums regardless of earnings or earning capacity. In addition even in those jurisdictions where the amount of compensation is dependent on the earnings or earning capacity, there are statutory provisions giving lists of specific injuries for which definite awards of compensation are provided and under such statutory provisions, there is no relationship between economic factors and the amount of compensation. The court said in the case of *State, ex rel Dudley vs. Industrial Commission,* (1939), 135 Ohio State 121, 19 N.E. (2d) 895:

> "Compensation for the loss of the sight of an eye is arbitrarily fixed, and has nothing whatever to do with impairment of earning capacity. It is quite possible, as demonstrated in the instant case, that a workman might lose the sight in one of his eyes due to an accidental injury and not lose one day's work or be reduced in wages. But that would not prevent him from successfully claiming an award."

The Committee desires to confine this

report to the discussion of how far the courts have gone in considering fluctuations of wages caused by economic forces as related to workmen's compensation. This question arises mainly in cases involving partial disability and our discussion is limited to disabilities of that type. A consideration of this problem divides itself into two parts: First, the relation between the increased earnings of an injured employee because of general wage increases and the effect given this factor by the courts; and Second, the relation between decreased earnings of an injured employee because of general wage decrease and the effect given this factor by the courts.

Turning first to an examination of the cases involving the effect given to a general wage increase on the right to compensation we find that in the case of *Epstein vs. Hancock-Epstein Company,* (1917), 101 Nebr. 442, 163 N.W. 767, it appeared that at the time of the determination of the right of the employee to compensation he was earning more than at the time of the injury. The statute in effect at that time provided that in case of partial disability the compensation "shall be fifty per centum of the difference between the wages received at the time of the injury and the earning power of the employee thereafter." It does not appear that there was any specific statutory provision authorizing the court to consider economic factors in awarding compensation. The court held that the employee was entitled to compensation despite the fact that his earnings were higher than before the accident and stated:

> "If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might have various reasons for receiving higher wages, though his earning power had been impaired by the injury. A general advance in his wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled."

In this case it was found that the employee by education and training, subsequent to his injury, fitted himself for more remunerative employment and the compensation award was affirmed.

Again in *Hood vs. America Refrigerator Transit Company,* (1920), 106 Kansas 76, 186 Pac. 977, the evidence disclosed that within a few months after the claimant received his injury he obtained employment with another employer in the same kind of work and had been earning almost double the amount of his average earnings at the time of his injury. The statute in effect provided that in case of partial incapacity, payments should be computed to equal fifty per cent of the difference between the amount of the average earnings of the workman before the accident and the average amount which he is probably able to earn in some suitable employment after the accident. The court in upholding an award for compensation stated:

> "While our compensation law proceeds upon the theory that usually the capacity of a workman to perform labor bears a close relation to his earnings when employed, we do not think his capacity in this respect is to be determined solely by the amount of his earnings. The question is effected by the demand for and supply of the particular kind of labor as well as by the cost of living and of commodities generally; these matters and the prices commonly paid at a given time or place for skilled and unskilled labor are factors which enter into the question. Everyone knows that within the past four or five years wages of all kinds have constantly advanced and in many kinds of employment have more than doubled. . .
>
> "The fact that he (the claimant) has obtained employment from another employer in the same kind of work, and has been able to earn a great deal more than his average earnings at the time he received the injury, must be regarded as accounted for by unusual conditions, of which the courts will not decline to take notice, and which have resulted in a general increase in the wages paid to laborers."

In *Lombard vs. Uhrich Planing Mill Co.,* (1918), 102 Kansas 780, 172 Pac. 32, the court stated that the fact that the plaintiff, after he quit the employ of the defendants was employed in a like capacity for other parties at a more remunerative wage, did not defeat his right to recover under the Workmen's Compensation Act. It appeared that the wage scale of the particular indus-

try involved had greatly increased in the meantime.

In *Marmon vs. Union Collieries Co.,* (1939) 135 Pa. Superior Court 582, 7 Atlantic (2d) 156, the court in considering the weight to be given to actual wages received stated that it was necessary to determine whether the claimant was actually earning the wages and that it was also necessary to take into consideration changes in wage scales and the condition of the labor market. It was stated:

> "The line of work that he (the injured workman) was then able to perform was much less remunerative than that in which he had been formerly engaged and the increased wages recently paid to him were partly due to a substantial increase in the amount paid to those engaged in this industry."

To the same effect is *Artac vs. Union Collieries Co.,* (1942) 149 Pa. Superior Court 449, 27 Atlantic (2d) 782.

An interesting case is that of *Standard Surety and Casualty Co. of New York vs. Sloan,* (1943) (Tenn.) 173 S.W. (2d) 436. In this jurisdiction the statute governing permanent partial disability provided for an award of the "difference between the wage of the workman at the time of the injury, and the wage he is able to earn in his partially disabled condition." In this case the claimant was a truck driver and was injured in a collision with an automobile as a result of which he sustained injury to his spine. At the time of filing his petition the claimant was earning more as an employee as a mechanic in an airplane plant than he had been earning as a truck driver. It was contended by the claimant that his present employment was temporary because it was in a war industry. In answer to this and in denying compensation the court stated:

> "In the instant case the employment of petitioner as has been shown is in the airplane industry as a skilled mechanic, and the court judicially knows that the belief is widely entertained and the prediction generally made that this relatively modern mode of transportation of both passengers and freight has limitless possibilities for development and growth. It cannot be said that skilled work in this great industry promises to be in temporary demand only."

Here the court has taken judicial notice not only of present economic conditions in a particular industry, but has also taken judicial notice, reasonably so it would seem, of future opportunities of employment in a particular industry. This certainly appears to be a sane and sound consideration of a problem of this nature.

A corollary to this problem is the question as to the right of an injured employee to have his compensation increased because of a general increase in wages. This is, of course, peculiarly dependent upon the particular statute involved. In *Woodilee Coal & Coke Company, Ltd. vs. M'Neill,* House of Lords—1917 ((1918) A.C. 43) it was held that subject to the statutory limitations as to the amount of compensation, a general rise or fall in the wages of the workman's trade is a factor which the arbitrator is entitled to take into account in fixing compensation. In this case a statute provided that the weekly payment of compensation should in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he was earning or was able to earn in some suitable employment or business after the accident; and it was also provided that such compensation "shall bear such relation to the amount of that difference as under the circumstance of the case might appear proper." Here the House of Lords affirmed a rule increasing compensation based on a general rise of wage levels on the theory that had the workman not been incapacitated, he would have shared in the general increase in wages.

In *Lerner vs. Jackwall Embroidery Co.,* (1922) 203 App. Div. 381, 196 N.Y.S. 736, one phase of the statute provided for an increase in compensation on the ground of change in conditions. It was attempted to increase the compensation because of a general increase in wages. On this point the court stated:

> "We do not think the expression in Sec. 22 of the law, 'on the ground of a change in conditions,' referred to a change in the average weekly wage for like work which occurs after the injury was received. Sufficient reason for these words in the statute is found in the fact that the condition of the injured person may change materially and unexpectedly. To allow an increase above the average

weekly wage at the time of the injury because there has been a general increase in wages due to unexpected causes would be to allow compensation entirely outside the insurance contract and outside the contemplation of the employer, the carrier, and the employee, and would place a burden upon the carrier which it had never contracted to assume. There was a general and considerable increase in wages in the years 1919 and 1920. Many awards for permanent disabilities made before this general increase are still outstanding."

In *Kanawha Fuel Co. vs. Industrial Commission,* (1921) 300 Ill. 608, 133 N.E. 238, it was held that the increase in the rate per ton paid after an employee's injury should not be taken into account in computing the amount under the Compensation Act to which he was entitled for partial incapacity. The provisions of the statute then in effect do not appear.

In the case of *Holliday vs. Martin Veneer Co.* (1944) 206 La. 897, 20 So. (2d) 173, an employee suffering partial disability contended that his rate of compensation should be increased because a new scale of wages was created after his injury under the Fair Labor Standards Act. The court refused to consider this, pointing out that compensation was based on average weekly wages "paid the injured employee and the term 'wages' is defined to be the daily rate of pay for which he was recompensed under the contract of hiring that was 'in force at the time of the injury'."

The second phase of our discussion dealing with the relation between decreased earnings of an injured employee because of a general wage decrease and the effect given this factor by the courts is the converse of the proposition hereinbefore discussed.

In *Beaulieu, Claimant — Androscoggin Mills, Employer,* (1934) 132 Me. 410, 171 Atlantic 696, the statute provided that compensation for partial disability shall equal two-thirds of the difference due to injury "between his average weekly wages, earnings or salary before the accident and the weekly wages, earnings or salary which he is able to earn thereafter . . ." The case directly presented the question as to the applicability of this statute under existing industrial conditions. The court stated:

"It is well settled that, in measuring the compensation of an employee for partial incapacity under such a statute, the loss or reduction in wages that he is able to earn after the accident, which is occasioned by general business depression, here referred to as 'industrial conditions', must be considered. In so far as the wages which he is able to earn now are reduced by that element, the loss must be borne by him, not the employer. It is not a loss 'due to said injury.' That is represented by his further loss of wages not due to his own fault."

The court then pointed out that the wage loss resulting from partial incapacity was not to be measured by the yard-stick of his former employment and stated:

"The question to be determined is what can he now earn in the work which is available and he has the capacity to perform, and how much more would he be able to earn in such employment if there were no depression. The difference between the amounts of these wages is his loss due to the business depression or 'industrial conditions'."

In the case of *In re Durney,* (1916), 222 Mass. 461, 111 N.E. 166, it appeared that the statute provided that in case of partial incapacity the employee should be paid one-half the difference between his average weekly wages before his injury and the average weekly wage he is able to earn thereafter. In this case it appeared that the average weekly wages at the time of the accident were $22 and that during the period of partial incapacity the wages were $13.20, but that if there had been no dullness or depression in business the employee would have earned $15 a week. The court held that if the employee's wages are reduced because of a depression in business conditions, the amount of such reduction should be ascertained and added to the wages the employee actually receives. Accordingly, the defendant insurance carrier was ordered to pay to the plaintiff one-half of the difference between $15 and $22 per week during the period of partial incapacity, although the actual earnings of the employee were $13.20 a week. To the same effect is *Capone's Case* (1921) 239 Mass. 331, 132 N.E. 32.

In *Johnson's Case,* (1922), 242 Mass. 489, 136 N.E. 563, the court said:

"While it is true that the employee, in

common with others, must bear the loss resulting from business depression, this does not mean that when the earning capacity is reduced by reason of the injury there may not be a recovery, even though business conditions may have become contemporaneously less favorable. It well may be that the reason why the employee suffered no loss in wages from December, 1917, until 1921, was the abnormal conditions produced according to common knowledge by the great War . . . Apparently this is an instance where exceptionally high wages and unusually favorable industrial conditions as to labor enabled the employee to avoid an impairment of earning capacity which otherwise his physical injury would inevitably have caused. *It is only the recession of those conditions which now has brought to light in the lowered weekly wage the natural result of the employee's injury.* This was the conclusion of the industrial accident board and it cannot be said to be unwarranted in law." (Emphasis ours.)

An interesting and enlightening comment is found in the case of *Trask vs. Modern Pattern and Machine Company,* (1923), 222 Mich. 692, 193 N.W. 830, as follows:

"If the amount to be awarded was based entirely on the provisions of Sec. 10, (i.e. the difference between earnings before and after the accident), it would be unfair either to the employer or employee, unless the rate of wages in that line remained constant. If there was a surplus of such labor with low wages at the time of the accident, and labor scarce with wages abnormally high at the time of the hearing, it would manifestly work an injustice to the employee, while the reverse of such conditions would likewise be unfair to the employer. There was in this case undisputed evidence of depressed industrial conditions at the time of the hearing, resulting in surplus of clerical labor and reduced scale of wages, and of the reverse at the time of the accident. . . . The proportionate impairment in earning capacity in that line of employment by reason of and considered as of the time of the accident—her loss of power to earn, or what she could earn if the accident had not befallen her —is the question to be fairly determined in view of the nature, extent, and continuance of her injury as shown at the time of the hearing, where the issue is partial incapacity. The wages she did earn at the time of the accident, and what she is able to earn at the time of the hearing, are made elements in reaching a determination; but the degree or percentage of partial impairment, if shown, as well as changes in wages and conditions of labor, are material considerations in arriving at impairment of earning capacity. The commission is authorized to review an award of weekly payment at any time on application of either party. It is common knowledge that there are periods of prosperity and of depression reflected in changes of labor conditions and wages. These, as well as the percentage of partial disability of the injured employee, are elements entering into a legal determination of the proportionate extent of partial impairment of earning capacity at the work in which the employee was engaged at the time of the accident."

In *Black vs. Merry & Cuninghame,* (1907) S.C. 1150, 46 (Scot) L.R. 12 it was held that a workman was not entitled to compensation in respect to the diminution of his earnings after he returned to work which was due to a general fall in wages, and not to any supervening incapacity.

In *Bevan vs. Everglyn Colliery Company,* (1912) 1 K.B. (Eng.) 63, 105 L.T.N.S. 654, 28 Times L.R. 27, the act in question provided for payment of partial disability based on the difference between the average weekly earnings of the employee before the accident and the average weekly amount which he was earning after the accident; it was further provided that the compensation should bear such relation to the amount of that difference as under the circumstances of the case might appear proper. It was held under this provision that the county court judge ought not simply to compare the wages actually earned by the workman before and after the accident, but he ought to give regard to extraneous circumstances, such as a general reduction in wages since the date of the accident. It appeared that since the date of the accident, a certain Eight Hours Act had been passed, the effect of which was to reduce the employee's compensation in the

industry generally. The effect of this legislation was taken into consideration by the court in fixing the amount of compensation. In this instance, therefore, the court permitted the economic effect on wages of a particular piece of legislation to be a controlling factor in its decision.

In *M'Combe vs. Bent Colliery Co.,* (1924) W.C. and Ins. Rep. (Scot) 183, it was held that where economic causes, plus the injury by accident, combined to bring about a reduction in wages earned, the abritrator was entitled to review a previous award, it appearing that, due to a general fall in wages, the sum paid no longer represented a reasonable proportion of the difference between the present and pre-accident earnings.

In *Santo vs. Symington Machine Company,* (1932) 261 N.Y.S. 706, 237 App. Div. 242, the statute provided in part as follows:

> "The wage earning capacity of an injured employee in cases of partial disability shall be determined by his actual earning . . .";

Section 14 of the Workmen's Compensation Act provided in part:

> "The average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation."

The weekly wage of the claimant at the time of the accident in 1925 was $30.95, after the accident and into 1926 he earned $20 a week, which earnings were increased until in July 1928 they amounted to $24. In July, 1930, his wages were reduced to $21.60 with subsequent cuts to $19.80 and $18.50. It was conceded that the claimant's physical condition remained unchanged and that the wage cuts were due to the general business conditions. The award which was affirmed was based upon the difference between his earning capacity before the accident and his actual earnings after the accident. The court after pointing out that the statute failed to take into account possible changes and fluctuations of the labor market stated:

> "A claimant who sustains injuries when wages generally are high and who is thus earning a high rate of pay, receives compensation at a disproportionately high rate whenever such compensation continues into a period when there is a general lowering of the scale of wages; conversely, a claimant who sustains injuries when wages generally are low and his earnings are small, receives compensation at a disproportionately low rate if his compensation continues into a period when the general level of the labor market has risen. In the former instance, the employee profits at the expense of the employer; in the latter, the advantage is with the employer to the disadvantage of the employee. Probably such a result was not contemplated by the Legislature, for the Workmen's Compensation Law seeks to achieve an equitable adjustment between employer and employee. However, that may be, the formula as to wage rate has been stated in the statute in clear and unmistakable language. If any change is to be brought about, it must be by amendment to the statute. The legislative, not the judicial, function must be invoked."

It is apparent, therefore, from an examination of the various cases that the courts generally, unless prohibited by statute, do and have given consideration to fluctuations in wages not only in periods of prosperity, but also at times when there is a general decline in the wage level. This is certainly a fair and equitable result. Where an injury occurs during a period of high wages which is followed by a period of reduced wages, it is unfair to the employer that compensation be based solely on the period of high wages without respect to subsequent economic developments. By the same reasoning it is unfair to an employee injured during a period of depressed wages to ignore subsequent rises in the wage scale. It is manifestly unjust to employer and employee alike to make compensation depend on fortuitous circumstances—rather, the yardstick should be as flexible as possible to permit the function of the Workmen's Compensation Acts as was originally intended.

That there will be many difficult and complex problems in the post-war era is not open to question. We believe that these various problems will be much more susceptible of a just, fair and equitable solution to both the employer and employee if latitude be given to the determining body to consider extraneous circumstances, such

as economic or industrial conditions as they actually exist. We believe that the decisions of the courts recognizing these extraneous factors are sound. In the absence of such judicial interpretations it seems advisable that the necessary discretion should be delegated to the proper body by legislative action.

Respectfully submitted,
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Proposed "Learned Treatises" Rule In Model Code Of Evidence of American Law Institute

BY KENNETH P. GRUBB
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THE American Law Institute in its Model Code of Evidence proposed Rule 529, entitled "Learned Treatises", reading as follows:

"A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject."

This proposed Rule is followed by the following comment:

"a. Comparison with existing law. Only a few courts receive the evidence made admissible by this Rule. The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This Rule will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose."

This proposed Rule is treated as an exception to the prohibition of hearsay. Professor Morgan in his foreword to the Model Code makes no comment on this Rule.

Dean Mason Ladd, in his article on the proposed Code, makes the following comment:

". . . A published writing on the subject of history, science, or art to be offered as attempting to prove the truth of the matters stated is admitted if the judge takes judicial notice of it or an expert testifies that the writer of the publication is recognized as an expert upon the subject. Under the present law of some states learned treatises may be used only to test the expert witness on cross-examination when he has stated that he relied upon the treatise as a source of his information. The new provision admits the treatise both as evidence and to test testimony given in court."

About six states have somewhat similar statutes or rules, most of them not going as far as the proposed Rule in that most of the statutes provide that such works "are presumptive evidence of facts of general notoriety or interest therein stated".

This Rule would be a startling innovation in the trial of personal injury cases in most states, particularly if it were to be widely used. Most good medical schools carry upwards to 35,000 volumes of medical books, some of the more extensive libraries carrying many thousands more. In addition to the *Journal* of the American Medical Society, practically all specialties publish periodicals, as do many state and local societies. In fact, I am informed that there are between 400 and 500 medical

periodicals published in the United States and Canada, and that there are thousands published in other parts of the world. It is a common saying among physicians that one can find some medical "authority" for almost any proposition, no matter how discredited or how little accepted by the more learned members of the profession, if one searches far enough.

At first blush it would seem that the adoption and general use of such a rule would result in trials of personal injury and compensation cases becoming a "battle of books". A personal injury lawyer, to be well prepared, would have to employ a medical scholar or librarian to discover the various treatises and procure them for introduction in evidence.

It is a common experience to find that well-qualified experts differ in the interpretation of many of these medical treatises. Most of them are written for the medical profession and without that degree of careful selection of language that should be required if the rights of people in litigation are to be determined by these books interpreted by laymen, either as jurors, judges or administrative officials. Such a proposal should be carefully examined and studied before being adopted.

An inquiry directed to the American Law Institute as to the discussions in connection with the adoption of this Rule elicited a reply from William Draper Lewis, its director, as follows:

> ". . . There was practically no discussion of the Rule before the Institute. It was first considered in 1941 in Tentative Draft No. 2. In that draft it was Rule No. 629, but the language has not been changed. When it came before the Institute for consideration, Mr. Morgan, the Reporter, stated that the Rule had long been advocated by Mr. Wigmore, 'But the danger that has been suggested to us is that there will be a battle of the books if you do adopt this Rule. The answer to that is, of course, the answer Judge Hand made—the control of the trial judge.' I do not remember any general discussion. I do, of course, remember the discussion of the Rule in the preliminary drafts. All of the members of the Committee were in favor of it, and though the objection which Mr. Morgan pointed out to the meeting was mentioned, it was disregarded. We all thought it would not result in a 'battle of the books', or if it did that the trial judge would decide the admissibility of the particular book offered."

Apparently the idea springs in the main from Dean Wigmore. In his work on evidence he discussed learned treatises as an exception to the hearsay rule and also some early cases relating to the admissiblity of such evidence. He referred to the statutes of California, Idaho, Iowa, Montana, Nebraska, Oregon and Utah, quoting the California statute as typical:

> "Historical works, books of science or art, and published maps or charts when made by persons indifferent between the parties are 'prima facie' evidence of facts of general notoriety and interest."

Professor Wigmore believed that learned treatises should be received as an exception to the hearsay rule upon the ground of necessity, because it is impossible to obtain the evidence of the leaders in scientific fields under ordinary circumstances unless published works are admitted. Dean Wigmore stated as another ground the "trustworthiness" of the usual published learned article and the circumstances under which it is published. He points out that the writer is ordinarily writing for his profession and therefore must expect that his work will be closely checked by people who know the subject; that he therefore will be careful to preserve his reputation. He points out that the writer has no interest one way or another in the lawsuit in which the writing may be offered. Wigmore admits that there are certain writings which would be open to objection because of interest on the part of the author. His example in that respect is that of a representative of an electric company producing alternating current equipment supporting the thesis that alternating current would be desired over and above other types. The Dean also mentions the fact that legal treatises and publications are used by courts to "refresh" memory. He regards this as a brazen effort to cover up judicial ignorance.

The Hon. John D. Wickhem, a Justice of the Wisconsin Supreme Court and formerly a Professor of Law at the University of Wisconsin, in a series of talks on the law of evidence before the Dane County Bar Association in the winter of 1939 and

1940, pointed out that medical witnesses acquire their knowledge from textbooks, laboratory and other experience, that such witnesses do not segregate in their minds the source of their information, that when they give their opinions, such cannot be barred as hearsay unless it can be demonstrated on cross-examination that the evidence is wholly based on hearsay. He refers to Professor Wigmore's view, that it is nonsense that the treatises themselves may not be admitted, and that the doctor may be disqualified because much of his information comes from treatises on, and studies of, the subject. Justice Wickhem is on the Council of the American Law Institute.

Members of the Association in states having somewhat similar statutes of whom I made inquiry have responded most generously. These responses show the following:

California:

"Books of Standard Authority — To Prove Public Facts. The term 'facts of general notoriety and interest' stands for facts of public nature, either at home or abroad, not existing in memory of men as co-distinguished from facts of private nature, existing within knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of exact sciences and of literature or art, when relevant to cause, that, under provisions of code, proof may be made by production of books of standard authority. *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 15, 6 Pac. 869."

"Medical Books—Are Not Admissible in Evidence. *People v. Wheeler*, 60 Cal. 581, 584; *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 6 Pac. 869."

Joe Sweet adds:

"I am doubtful that controversial matters of science can be established by books."

Iowa:

I am informed that there are rulings that medical books as such are not admissible. They are used to a certain extent by agreement between the parties and extensively in cross-examination. This is true in states not having such statute.

Montana:

In *Lynes v. Northern Pacific Ry. Co.*, 43 Mont. 317, 117 Pac. 81, the court received in evidence a table showing the effects of experiments made by a manufacturer of air brakes. I am informed that the Montana court has not passed upon the question as to whether medical books as such are admissible. Here also they are used on cross-examination.

Nebraska:

I am informed that medical books as such are not received as independent evidence of matters therein stated. The reason for such rule is set forth in the case of *Van Skike v. Poter*, 73 NW 294, 53 Nebr. 28, as follows:

"The authorities, both English and American, are practically unanimous in holding that medical books, even if they are regarded as authority, cannot be read to the jury as independent evidence of the opinions and theories therein expressed or advocated. One objection to such testimony is that it is not delivered under oath; a second objection is that the opposite party is thereby deprived of the benefit of a cross-examination; and a third, and perhaps a more important, reason for rejecting such testimony, is that the science of medicine is not an exact science. There are different schools of medicine, the members of which entertain widely different views, and it frequently happens that medical practitioners belonging to the same school will disagree as to the cause of a particular disease, or as to the nature of an ailment with which a patient is afflicted, even if they do not differ as to the mode of treatment. Besides, medical theories, unlike the truth of exact science, are subject to frequent modification and change, even if they are not altogether abandoned. For these reasons, it is very generally held that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury."

I am informed that these books are used mostly in rebuttal and in cross-examination, but that occasionally the medical witness will support his opinion by reference to textbooks.

Oregon:

In *Scott v. Astoria Railroad Co.*, 43 Ore. 26, 72 Pac. 594, the court held that books

on civil engineering were not competent evidence of the degree of slope that might safely be given to an earth embankment. The court quoted the statute and stated that an expert might substantiate his views by books. It commented upon the fact that standard works of civil engineering are treatises that relate more nearly to matters of exact science than do medical books. The Oregon court has approved the use of medical books in cross-examination. I am informed that the statute is not used extensively but that medical works are used in cross-examination as in other states.

Utah:

I am informed that the statute is used occasionally so far as medical articles are concerned, but that they are still primarily used for the purpose of check on cross-examination of an adverse witness.

Those in the profession who have been actively engaged in the trial of personal injury cases of various kinds have learned that the generally accepted ideas and beliefs of the medical profession change rapidly from time to time. Concepts which have been accepted for years are suddenly disproved or new theories are adopted. Doctors are as prolific with writings as rabbits are with young. Some of their treatises seem to be as hastily conceived. Some of their magazines and pamphlets set forth reports on one medical case and sometimes on but a few. Reports on other occasions cover an extensive study of a large number of cases. Obviously, conclusions arrived at by observation of a very few cases should not be acepted at face value, until they are more thoroughly proven. None should be until various factors bearing upon what happened in a given case, such as resistance of the patient, environment, background, nutrition, efficiency of function of the various organs, glandular efficiency and the like, can be known and evaluated.

There are other obviously difficult problems in applying such a proposed rule. Who is an expert on a medical subject? How may a judge in Florida properly pass upon the expertness of a physician in the State of Washington who writes an article for some medical publication? With the exception of a very few men of outstanding national reputation, what basis does a physician in Maine have to pass upon the qualifications and scientific ability of the author of some article in a remote community? There are thousands of doctors in this country alone who are constantly studying a myriad of problems, and are turning out, often without due consideration, conclusions which the extent of their study and background do not justify.

Another great problem about the application of this rule is the fact that these articles, generally written only for the medical profession, are often confusing even to this profession. The average medical authority in writing his article does not use that degree of exactness that the attorney employs in drawing a will, contract, trust agreement or statute. Certainly the American Law Institute gathered together a group of outstanding jurists, legal scholars and lawyers in preparing its Re-statement of the Law. It is my understanding that these sections were considered and discussed very carefully and with the idea of having the language exact and not subject to ambiguity. This was done by men whose background was such that if anyone could avoid the pitfalls of inexact language, this group in its collaboration should have done so. Yet I have known of very able appellate court judges who in some instances could not decide what was meant by some of the statements in this work or how to apply it to an unusual state of facts. It is a monumental work, but how many laymen could take that work and tell you what the Law is?

No doubt many attorneys have wrestled with the problem of "traumatic cancer". If there is anyone who had made a study of cancer and who was regarded by the profession as an expert on that subject, it was James Ewing. Nevertheless, his article in the May, 1935, issue of the *"Archives of Pathology"*, entitled "Traumatic Cancer", is subject to different interpretations by physicians. I cannot believe that a lay jury would be as apt to arrive at a correct decision on this question by the use of this article, as it would if the matter were explained to it by medical witnesses. Ewing, for example, states five postulates after an introductory paragraph. This, when carefully read, might well justify the conclusion that he does not mean that the cancer is traumatic if these postulates are present, but means only that if they are not all present, trauma cannot even be considered as a cause. A layman might well obtain the

impression that Ewing believed that if those five postulates are present, the cancer would be traumatic. Similarly, publications on trauma and heart trouble, trauma and diabetes, the direct effect of such industrial diseases as silicosis, lead intoxication and the various industrial poisons and their effect on the various human organs are myriad. In many instances publications of "experts" are not in accord as to these questions. Most of these authorities are not too careful in their choice of language. Many treatises are based on a far too limited observation or experience to be of value. Yet, under the proposed rule, if a witness, "expert" on the subject, testified that the writer is recognized in a profession as "an expert in the subject", these various publications, pamphlets and articles become admissible and go to the jury as tending to prove the truth of the matter stated therein. They go to a lay jury to evaluate, to apply, to ponder on and to determine what is meant and what is intended in the article. For a jury then to evaluate the various extraneous factors, which even the author might not have attempted to evaluate, is asking no little of lay persons.

An occurrence in Wisconsin a few months back serves as an extreme illustration of what could happen under the proposed Rule. A well-known doctor testified that a moderate degree of silicosis was the cause of a fatal lung abscess. On cross-examination he admitted that he had never seen such a case previously. He frankly admitted that he had been unable to find anything in American literature or statistics to justify his opinion of a causal connection. When pressed further, he produced a photostatic copy of an article published in Berlin, Germany, in 1942. If this proposed Rule had been in effect, that article, on the doctor's testimony that the author was recognized in his profession as an expert, would have been admissible as tending to prove the truth of the matter therein stated.

The possibility of manipulation under such a rule is shown in *U. S. v. Hartford-Empire Co.*, 46 Fed. Supp. 541 at 612. It appears in that opinion that persons interested in a patent wrote an article, paid $8,000 in cash to have the president of a union sign it. It was then published under the title "Introduction of Automatic Glass Machinery; How Received by Organized Labor." The article was then called to the attention of the patent office without disclosing its real authorship or the circumstances surrounding its publication.

Unsatisfactory as is the present occasional "battle of experts", it has advantages over this proposed Rule. Under the present practice the jury can hear what the witness says. The witness chooses his language for a layman rather than for a technical person. It is still important that there be an opportunity by cross-examination to show bias, lack of logic or consistency, lack of adequate ground for the basing of an opinion, or other material things which could not be brought out where the author of the article is not before the court. The right of cross-examination, the right to be faced by and to question your accuser—whether the proceedings be criminal or civil—still constitutes a cornerstone of justice and a fair trial as we know it.

In spite of the fact that the proposal emanates from such distinguished men, I believe it should be carefully considered by those engaged in the actual trial of this type of case. Would this proposed Rule improve the understanding of jurors, the accuracy of the layman's verdict on medical-legal problems? Would it not be subject to abuse?

I have grave doubts as to whether this proposed Rule, if used extensively and literally, would be a real improvement on the present practice.

Allergy And The Law

(An article supplemental to the Report of the Committee on Casualty Insurance, published in the July 1944 INSURANCE COUNSEL JOURNAL.*)*

BY FRANK X. CULL
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THE interest which has developed among *Journal* readers in the brief discussion of allergies contained in the report of the Committee on Casualty Insurance published in the July 1944 issue of the *Journal,* suggests that the contribution of S. Paul Weiss to the Committee's report dealt with a subject of timely importance. The interest so manifested also suggests the desirability of a more comprehensive discussion of the subject.

The reason for the interest is not far to seek. The ever increasing number of gadgets and appliances, designed to meet supposed human needs, has resulted in a corresponding expansion of products liability insurance. One's memory need not go back far to visualize the contrast between the simple living of earlier days and the complicated life of today. The little corner drug store of our boyhood days, with its luminous red and green jars, emblematic of the apothecary's art, has now become a department store for the sale of hundreds of gadgets, cosmetics, patent remedies and the like. The pleading voices of the radio announcers are constantly beating down the sales resistance of any who will listen to their recital of the virtues of a thousand commodities covering in range all of the needs of mankind, both real and imaginary. Temporarily, the war restrictions have slowed down the production of civilian products, but it is to be expected that the return to peace will bring an avalanche of production. Casualty insurance will keep abreast of that avalanche of production. The manufacturers and chain store operators have learned from harsh experience that insurance protection must be as wide and as comprehensive as their own far-flung operations. Casualty insurance must expand side by side with commerce.

This article will deal with but one of the many questions of possible liability of the seller or manufacturer of commodities. To put the question concisely, it is this. To what extent, if at all is the manufacturer or seller of a commodity liable to the purchaser who is allergic to its use? To state the question more concretely – If a druggist sells a cosmetic preparation to a customer, and if it happens that the customer is allergic to the ingredients used in the cosmetic preparation, and is injured thereby, is the druggist liable to the injured customer? To state another example of the same question–If a clothing manufacturer sells a fur coat to a customer who has an allergy to the particular kind of dye used in coloring the fur, is the furrier liable to the customer who has been injured thereby? Is the implied warranty of suitability so wide in scope as to include a representation that the commodity so sold is suitable universally; or is the implied warranty so limited in law that it includes only the suitability for normal persons? There are thousands of ways in which the question as to the liability of the manufacturer or the vendor may arise. I believe, however, that by developing the principles governing a few cases, we can develop some principles which will have application to many.

First, what is an allergy? The word is much heard in this era of medical discovery. Much has been written upon the subject in recent years. A great deal of the earlier writings are now considered outmoded, and it is likely that a great deal of what is presently considered authentic will be outmoded tomorrow. The study of allergy is still in its infancy. Allergy has been defined as the idiosyncratic reaction of a particular person to some substance to which a so-called "normal" person will not react. We are not concerned here with meticulous accuracy of definition. For our purpose it is enough to know that human beings react differently to different substances. For the vast majority of human beings, the simple foods and the simple articles of life have no harmful effect. Yet there is a very small minority of persons to whom certain of the simple articles of food are poison. For instance, the increased consumption of milk is urged as part of a gen-

eral nutrition program; but it is well established that some individuals are hypersensitive to milk. The number of harmless substances to which a small minority of the population is allergic, are legion.

If the manufacturer or vendor of simple articles of food or simple articles of commerce is to be held liable to the purchaser who is allergic to their use, it would lead to the establishment of a harsh legal doctrine of liability without fault. The better reasoned opinions in the reported cases have not gone so far, either in the law of negligence or the law of warranty. The reports of the cases are coming into the books with increasing frequency, and it is encouraging to see that the development of the law is taking a course which we, as lawyers, will approve.

The most important element for the defense attorney to discover in any of these cases, is whether the article alleged to have caused the injury contains a substance coming within the classification of a "primary irritant". If the article does not contain a primary irritant, but contains only harmless and innocuous ingredients, there can be no liability either in negligence or in warranty, even though it cause injury to a person who is allergic to its use. If, on the other hand, the commodity does contain a primary irritant, the defense attorney will have need to make very careful inquiry to ascertain the amount of the primary irritant used in the manufacture of the article and the amount of tolerance which the ordinary human being has for such primary irritant. Thus, the cases fall within two classes. First, the cases of pure allergy which involve no use of a primary irritant; and second, the cases involving the use of a primary irritant. In the latter cases the question will be the amount used as an ingredient and the reaction of a normal human being to such an amount.

The controlling legal principles, briefly stated, are these:

1. If the substance is composed entirely of innocuous ingredients which could not be harmful to anyone other than an allergic person, there is no liability either in negligence or in warranty; and

2. If the substance contains an ingredient which is a primary irritant, it may become a question of fact as to whether the primary irritant was used in such quantity as to exceed expected tolerance of the individual.

There is a point at which any substance coming within the category of a primary irritant will begin to cause damage to the human tissue. If that were not so, the substance would not be a primary irritant. Some persons are so physically constituted that they have little or no tolerance for some primary irritants. Others may have a great deal of tolerance. Thus, the amount of the primary irritant used is an essential element in the latter type of case.

In the preparation of the defense of this class of cases it will be found that in a great number of instances where substances containing primary irritants are compounded to be put on sale on a country wide basis, patch tests or other similar tests have been conducted by the manufacturer's laboratories before the commodity is put on sale. It is useful, therefore, in such cases, to correspond with the manufacturer's laboratory to ascertain what tests have been made.

Turning to a discussion of a few of the cases in which the courts have considered the liability of a manufacturer or seller to a customer who has been injured either as a result of a pure allergy, or as a result of a low degree of tolerance to a primary irritant, the following cases are typical illustrations of the principles stated

In *Flynn v. Bedell,* 136 N.E. 252, the Supreme Judicial Court of Massachusetts considered a case in which a dermatitis was alleged to have resulted from contact with a fur collar. In affirming a judgment for the plaintiff, the court said:

> 'It well may be that the scope of an implied warranty of fitness does not extend to fitness in respect to matters wholly unknown to the dealer and peculiar to the individual buyer. A seller of food presumably does not warrant that the particular kind of food which the buyer calls for will be suited to his peculiar idiosyncrasies, *so where there is no evidence of any intrinsically unhealthful feature in a fur but only that the buyer is constitutionally unable to wear fur of this sort because of a supersensitive skin, the warranty of fitness presumably does not apply.* * * * but it appears that the peculiar 'defect' which injured the plaintiff would have similarly injured any normal person."

Later the same court had before it a case in which it was claimed that the plaintiff had contracted a dermatitis from the use of a cosmetic powder. It was sought to be shown upon the trial that the plaintiff was peculiarly sensitive to such aniline dyes as were used in compounding the powder. The court said:

"We do not think that a seller of face powder containing a known irritant to 'some' persons' skins, can be heard to say that he is not liable for a breach of implied warranty of fitness where injury results from a use of the powder by one such as described by the evidence in the case at bar. In passing we think it should be said that we are dealing here with the questions of law raised in the case at bar without attempting to lay down any general rule not called for by these questions. For example, there was testimony that the sensitiveness of the plaintiff's skin to the dye was similar in kind to the 'allergic' condition of some people to harmless and non-dangerous substances such as strawberries, eggs, pollen or other products in common use. The case does not call for a consideration of the possible legal consequences which may follow from the use of such substances or products by a person who may be said to be 'allergic' to them." (*Bianchi v. Denholm and McKay,* 19 N.E. (2d) 697, Mass. 1939).

In *Zirpola v. Adam Hat Co.,* 122 N. J. Law 21, there was a claim that the plaintiff had sustained a dermatitis from the dyes used in a hat band. Here also it was sought to be shown that the plaintiff had a hypersensitivity and that the warranty of suitability applied only to the normal or average person. In passing on this contention the court said:

"We find no merit in this contention. There was expert testimony presented by the plaintiff to show that the dye in question was of a poisonous nature, that the use of the same is forbidden in New York and other states; that as a result of several tests the poison was found to be contained in the outside ribbon and sweatband of the hat; that four or five per cent of all persons coming in contact with this dye would react to and be injured by it to an appreciable extent, but that all persons are somewhat sensitive to the poison."

With reference to plaintiff's supposed hypersensitivity the court said:

"The mere fact that only a small proportion of those who use a certain article would suffer injuries by reason of such use does not absolve the vendor from liability."

A similar question was before the Michigan Supreme Court in *Gerkin v. Brown and Sehler Co.,* 143 N.W. 49, with substantially the same result. The court said:

"That the great majority of persons are safe from the particular danger concealed in the article sold or that few injuries in fact result from its use *does not militate against this principle when the certain facts of imminent danger to a percentage is established.* Many people are immune from the most virulent contagious diseases and the percentage of injuries to those ignorantly using defective machinery or dangerous explosives or unwholesome or dangerous deleterious foods is small in proportion to the number who ignorantly or knowingly use them. But it could not be contended for that reason that the person knowingly renting a house or selling clothing which were infected with smallpox or selling defective machinery or tainted meats or dangerous explosives without warning to one ignorant of the danger and who was injured thereby, might escape liability."

In *Smith v. Denholm and McKay,* 192 N.E. 631, the suit was for injury alleged to have resulted from the use of skin cream. The skin cream was shown to contain thalium acetate. The defense showed that the plaintiff was peculiarly susceptible to this substance, but the evidence showed that the substance is poisonous, and that a mixture containing one per cent may cause injury. It was shown that the samples tested contained more than one per cent. Accordingly a judgment for the plaintiff was affirmed.

Valmos v. Smoots, 269 Fed. 356, illustrates the point that there may be no liability where the substance claimed to have caused the injury was used in such weak solution that injury could not reasonably have been anticipated. That case arose out

of the use of a bottle of eyewash containing zinc sulphate. Zinc sulphate was shown to be an irritant the use of which, if continued long enough, would cause a change in the structure of the eye. Defense counsel showed, however, that the zinc sulphate was used in such weak solution that injury could not reasonably have been anticipated. The Circuit Court of Appeals affirmed the judgment for the defendant.

Ross v. Porteous Co., 3 Atl. 2nd 650, is typical of the cases in which the absence of a primary irritant was shown. That was an action brought to recover for injury alleged to have resulted from the use of flesh colored dress shields containing rhodamine dye. It was shown that the particular rhodamine dye was an inert and harmless chemical substance. Recovery was denied. This was a true allergy case. The reviewing court said:

> "The implied warranty of the statute that goods sold for a known particular purpose 'shall be reasonably fit for such purpose', measures the buyer's right for recovery, and the seller's liability. *It is accordingly held that in the sale of wearing apparel, if the article could be worn by any normal person without harm, and injury is suffered by the purchaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear."*

Willson v. Faxson, 138 App. Div. 359 (N. Y.) affords another illustration of the principle that the use of a primary irritant within the limits of allowable tolerance does not afford the basis for recovery. That case involved the use of a remedy known as Cascara Sagrada. The plaintiff claimed to have developed a case of mercurial salivation. An examination of the tablets proved that each one contained one-fifth of a grain of calomel. The medical proof showed that injury could not have been anticipated from the use of any amount of calomel less than one grain with or without a cathartic. A recovery was denied.

In *Walstrom v. Miller,* 59 S.W. (2d) 895, (Texas), claim was made for injury alleged to have resulted from the use of an eyeglass frame purchased from an optical company. A judgment for the plaintiff in the trial court was reversed because of the absence of any proof of a poison that would cause injurious reaction to the ordinary individual. The court found that the plaintiff's injury was the result of his own hypersensitivity and for such injury there could be no recovery.

From these and similar cases the following conclusions can be drawn;

(1) If the substance in question contains only harmless and innocuous ingredients, and the injury results only because of the hypersensitivity of the plaintiff to such ingredients, there is no liability upon the vendor or manufacturer.

(2) If the substance contains an ingredient which is in the category of an irritant, there can be no liability if the substance is used in such weak solution that injury could not reasonably have been anticipated.

(3) If the irritant is used in such solution that it would not injure the normal person but might cause injury to a group or class having less than normal tolerance, a factual question arises either upon the issue of warranty or negligence.

Assumption Of Risk As A Defense In Automobile Guest Cases

By Fletcher B. Coleman
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WHEN an individual exposes himself to a known risk or hazard, and is injured as a consequence of the exposure, any claim that he presents is subject to the defense of assumption of risk.

The doctrine of assumption of risk was confined originally to cases arising out of the relation of master and servant, or cases involving a contract relationship. At that time the exposure to a known risk or hazard was considered contributory negligence, but there has been a gradual transition or trend toward the designation of the defense as assumption of risk. Assumption of risk has been said to be a form of contributory negligence, and it has been said also that assumption of risk is a form of contributory negligence but is not the equivalent of contributory negligence.

Assumption of risk and contributory negligence have been distinguished on the basis that contributory negligence is carelessness and that assumption of risk is venturousness. In any event, courts recognize the right of a defendant to assert as a defense that the plaintiff is not entitled to recover when he exposes or continues to expose his person to a known hazard of riding or continuing to ride in a car that is defective or that is being operated by an incompetent operator.

The defense of assumption of risk in automobile guest cases can be asserted when the guest assumes the known hazard of (1) riding with an operator who is known by him to be incompetent because of inexperience, intoxication, etc.; or (2) riding in an automobile that he knows to be defective or improperly equipped.

RIDING WITH AN INCOMPETENT DRIVER

One of the most informative opinions on this subject was written by Judge Albert of the Supreme Court of Iowa in the case of *White vs. McVicker,* 246 N.W. 385. Judge Albert cites many cases and quotes from the Harvard Law Review and from Broom's Legal Maxims. In the opinion he writes as follows:

"The sum total of the application of this doctrine simply stated is that, where one is placed in the position where he has his choice of doing or not doing a given act, this doctrine applies. We take it to be the rule therefore, under this doctrine, that, where one voluntarily becomes a guest in an automobile, with a knowledge that the driver is incompetent or inexperienced, or after he has assumed his position in the car, it comes to his knowledge that the driver is intoxicated, or is reckless in his driving, and with such knowledge on his part he aids or encourages the driver, or acquiesces or joins or cooperates in such recklessness, he takes the chance of an accident and, in case an accident occurs, arising from such known incompetency, inexperience, or intoxication of the driver, or other such known recklessness, then plaintiff cannot recover."

(See also *Schwab v. Martin* (Wisc.) 279 N.W. 699.)

Judge Owens of the Wisconsin Supreme Court made a fine analysis of the question in the case of *Cleary v. Eckart,* 191 Wisc. 114; 210 N.W. 267. Judge Owen wrote as follows:

"When one drives his car to his neighbor's door and invites his neighbor to an automobile ride, does not the neighbor accept the hospitality which the host has to offer? That hospitality consists of the car and the driver. When he accepts the invitation and enters the automobile, does he not accept the car in the condition in which it exists and such skill as may be possessed on the part of the driver? That there is a great variation in the degree of skill possessed by those who assume to drive cars is well known. Not all who drive automobiles by any manner of means can be said to be expert drivers. The danger thus assumed is the danger that should not be increased and to which the host should add no new danger. If the host driving the car conscientiously exercises the skill possessed

by him in handling the car under emergencies, does the guest have a right to demand any more? Does the guest have a right to demand of the host a degree of skill for the security of the guest which the host is utterly unable to exercise for his own protection? It would seem that the statement of this question carries with it its own answer, and that the same consideration which compels the guest to accept the car in the condition in which he finds it also compels him to be content with the honest and conscientious exercise of such skill as the host or driver may have attained in the management and control of the automobile in emergencies.

* * *

"We think that one who asks another to ride with him in his automobile does not guarantee to the guest a sound automobile or an accomplished degree of skill in the management thereof. His duty extends only to refraining from increasing the danger which the guest assumes upon entering the automobile manned by the driver provided, or from adding a new danger."

The rule is stated in *Blashfield Cyc. of Automobile Law,* Vol. 4, Sec. 2512, as follows:

"A guest entering an automobile assumes the dangers incident to the known incompetency, inexperience, and driving habits of the driver. Thus, such guests accept whatever risk may attend the degree of proficiency which their host has acquired as a driver, and the hazards which are connected with his usual and customary habits, with which they are familiar."

The Supreme Court of South Dakota in the case of *Hall v. Hall,* 258 N.W. 491, held as follows:

"We conclude, therefore, that a non-paying passenger, when he enters an automobile should and does assume the risk of any injury resulting from the lack of proficiency of the driver, at least to the extent that the degree of proficiency is known to the non-paying passenger. This record discloses that the plaintiff knew of the degree of proficiency attained by the defendant in driving an automobile * * * It follows that appellant (defendant) at the time in question exercised such skill and judgment as she possessed, the extent of which was known to the respondent. Respondent cannot recover."

In the case of *Hatch v. Brinkley* (Tenn.) 80 S.W. (2) 838, the plaintiff guest sued the owner driver to recover as a result of an accident that occurred when the driver drove his car too close to the edge of the road. The wheel slipped off. The driver lost control and the accident occurred. The evidence showed that the driver was not experienced, and that he was known to be reckless. The court held:

"This was an unfortunate accident, but as far as appears from the record Hatch, with his lack of skill which was known to plaintiff, was driving as carefully as was his custom, and when his right rear wheel for some unknown reason slipped off the pavement he exercised his best skill and judgment in his attempt to get it back on, and should not have to account to his guest for the resultant injury which she received."

The Supreme Court of Arkansas has held that one who enters an automobile as a guest not only takes the car as he finds it (subject, of course, to the limitation that such defects are not known to the owner) but also assumes the known risks incident to the driver's incompetency, inexperience, and driving habits. *Peay v. Panich* (Ark.), 87 S.W. (2) 23.

One of the most recent cases passing upon this defense is that of *Young v. Wheby,* (W. Va.) 30 S.E. (2) 6. In that case the Supreme Court ruled that a guest is debarred as a matter of law by assumption of risk or contributory negligence from recovering for personal injuries when he becomes aware that the driver is incompetent and continues to ride, after having a reasonable opportunity to alight.

The Supreme Court of Utah also has passed upon this question in the case of *Maybee v. Maybee,* 79 Utah 585; 11 Pac. (2) 973. The Court held that the plaintiff was not entitled to recover as a matter of law, as recited in the following quotation from the opinion:

"The evidence shows without contradiction that the plaintiff had full knowledge of the condition of the eyesight of her mother, the fact that she was driving

without glasses, and the rate of speed at which the car was driven. That she appreciated the danger or risk is shown by her inquiry of her mother as to whether she was getting along all right. She was herself an experienced driver and is charged with knowledge of the dangers and risks incident to a near-sighted driver without glasses driving at a high rate of speed. She cannot ignore such obvious dangers or intrust her safety absolutely to the driver under such circumstances. Because of her acquiescence and consent to be driven under these circumstances, she herself participated in the negligence which caused the injury, and she is therefore barred from recovery."

RIDING IN DEFECTIVE CAR

The guest in an automobile takes a car as he finds it, with reference to defects not known to the owner. This rule has been upheld in New York in the case of *Galbraith v. Busch,* 196 N.E. 36, wherein the court stated:

"The plaintiff was only a guest in the car. She assumed the risk of any defect in the automobile, which was not known to the defendants. They assumed the duty to exercise reasonable care for her protection in the operation of the automobile. They were under no duty to exercise care to discover and repair defects not known to them."

This case sustained the holding in the earlier case of *Higgins v. Mason,* 255 N.Y. 104; 174 N.E. 77.

The rule also has been upheld in South Dakota in the case of *Petteys v. Leith,* 252 N. W. 18. The rule was stated in that case as follows:

"The rule is established by what appears to be the weight of authority that one who invites another to ride with him in his automobile does not guarantee to the guest a sound automobile; the guest must accept the vehicle as he finds it; and the duty of the owner or operator extends only to refrain from increasing the danger which the guest assumes upon entering the automobile or from adding a new danger."

The rule also was upheld in the case of *Coffey v. Ouachita River Lumber Company, Inc.,* (La.) 191 So. 561. In that case a spring broke causing the driver to lose control, and the truck went into a ditch. The occupant of the car was denied a recovery.

The Supreme Court of Minnesota in the case of *Lestico v. Kuehner,* 283 N.W. 122, in the syllabus by the court, stated:

"Where there was evidence that the accident was due to sudden deflation of a tire, which was almost new, the jury should have been instructed that there is no liability for a 'pure accident'. Where there is evidence that sudden deflation of an almost new tire was the sole cause of the accident * * * there should have been an instruction that if the deflation was the sole cause of the accident owner driver was not liable."

See also *Turney v. Meyer,* (Mich.) 253 N.W. 226.

In *O'Shea v. Lavoy,* 175 Wisc. 456, 185 N.W. 525, it was held that the owner of an automobile is not liable for damages to an invited guest riding therein for injuries sustained by the latter, due to the turning over of the machine because of a defective spring, even though it was a second hand machine and the spring was repaired with old parts. "Defendant," said the court, "considered the automobile to be in sufficient condition to make the trip. This was evidenced by the fact that he not only intrusted his own safety thereto but that of his wife and children as well. There can be no stronger evidence of the belief of the ordinary well meaning man in the sufficiency of the car to safely make the trip. So we have a situation where the owner of an automobile who is about to make a pleasure trip, fully believing in the sufficiency of the car to do so with safety to the occupants, with the best of motives and with a view of promoting his pleasure invites his father-in-law to ride with him, and by reason of the giving away of some part of the car the father-in-law sustains injuries. Under such circumstances, it is clear to us that the father-in-law in accepting the invitation took the car as he found it, was attended by the same measure of security enjoyed by the owner and the other members of his family, and that he was entitled to no more."

This is not intended as a complete treatise or brief on the subject. It is intended that this will serve to promote further study and research by claim men and attor-

neys having a case where the claimant should not collect because of his assumption of a risk. The application of the doctrine of assumed risk as a defense to potential claims is something that must be recognized by the investigator at the inception of the investigation. Attorneys who maintain claim departments in their law offices and claim executives should be sure that their investigators are equipped with a proper understanding of this legal doctrine. If the defense is available the facts to sustain it must be established in the early stages in the investigation. It may be too late to establish them when the investigation report has reached the desk of a senior lawyer in a law firm, or the desk of a claim executive. There is ample law to sustain the defense where it is proper to use it, and the doctrine constitutes one of the tools available to obtain justice in guest cases.